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THE LAW OF INTERNATIONAL TRADE: COPYRIGHT LAW RELATED ASPECTS OF THE USE OF THE INTERNET FROM A GERMAN PERSPECTIVE IN COMPARISON TO SOUTH AFRICAN LEGISLATION AND JURISDICTION

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ABBREVIATIONS

(A)	Appellate Division
A.L.R.	Australian Law Reports
All E. R.	All England Law Reports
Aus.	Australia
BBS	Bulletin Board System
BGB	Bürgerliches Gesetzbuch**
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen*
BMJ	Bundesministerium fuer Justiz
(C)	Cape Provincial Division
Ch.	Chancery Division
Ch D	Chancery Division
CR	Computer und Recht*
Ct	Court
CD	Compact Disc
CD-ROM	Compact Disc – Read Only Memory
E-Mail	Electronic Mail
f.	followed
ff.	and following pages
fn.	footnote
GATT	General Agreement on Tariffs and Trade
GRUR	Gewerblicher Rechtschutz und Urhberrecht*
GRUR Int.	Gewerblicher Rechtschutz und Urheberrecht – Internationaler Teil*
HTML	Hyper-Text-Markup- Language
HREF link	Hypertext Reference Link
ICMP	Internet Control Message Protocol
IMG link	Image Link
I.P.R.	Intellectual Property Report
JOC	Judgments on Copyright
KUG	Gesetz, betreffend das Urheberrecht an Werken der bildenden Künste und der Photgraphie**
LG	Landgericht
Ltd	Limited
MarkenG	Markenrechtsgesetz**
mn.	margin number
NJW	Neue Juristische Wochenschrift*
NJW-CoR	Neue Juristische Wochenschrift – Computer Report
OLG	Oberlandesgericht
OSPF	Open Shortest Path First
p.	page
Pty	Proprietary
RAM	Random Access Memory
RBC	Revised Berne Convention
RFC	Request for Comments

RIP	Routing Information Protocol
SA	South African Law Reports
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
(T)	Transvaal Provincial Division
TRIPS	Agreement on the Trade-Related Aspects of Intellectual Property Rights
UrhG	Gesetz über Urheberrecht und verwandte Schutzrechte**
URL	Uniform Resource Locator
UWG	Gesetz gegen den Unlauteren Wettbewerb**
v	versus
(W)	Witwatersrand Local Division
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonogram Treaty
WRP	Wettbewerb in Recht und Praxis*
WWW	World Wide Web

Those marked * are German law journals, those marked ** German Acts.

TABLE OF CONTENTS

1 Introduction

Today, the Internet cannot be described any more as a new technology, even though it is still growing and new features are constantly invented and added. The Internet is now in constant daily use by millions of users all over the world. However, as it could be observed many times before, legal developments find it difficult to hold pace with the technical development. That is especially true in regard to copyright law and the use of the Internet. Although computer programs and their specific requirements are now renown internationally by many legal system, so far there are little regulations which deal with the specific demands of the Internet use. However, efforts in that direction are undertaken, but the outcome is still uncertain.

In Germany, first serious efforts to tackle the legal problems of the Internet could be observed in 1996, but only in the recent two years a large number of publications dealing with different problems in that regard were made available to the public. The situation in South Africa is somewhat different. Only little publication in that regard could so far be found. Often, for whatever reason, problems are actually more pointed out than an effort is made to provide an answer. Still though, one will actually find, that many problems can be discussed in an international context regardless to the exact provisions of a certain legal order. The following work will therefore compare the German and South African legislation and jurisdiction in regard to copyright related aspects of the Internet. Although one will observe that more room is given to the German point of view, it is to hope that this will at the same time serve as a source of inspiration to the South African lawyer. The final aim, however, should be to harmonise internationally rules in that regard, so that no legal order is to prevail or, to put it into other words, the aim is to make the law as 'international' as the Internet itself.

1.1 Need of internationalisation of the Internet law

In the American case American Civil Liberties Union v. Reno[1] the Judge stated: "The Internet is not a physical and tangible entity, but rather a giant network which interconnects innumerable smaller groups of linked computer networks." That giant network, however, is not confined to the boundaries of a certain state; it expands world-wide. What is put into the Internet in South Africa will also appear in every other country of the world, which is linked to the Net[2]. Consequently, the South African Internet publisher does not only have to take into account the considerable body of domestic law dealing with copyright, trademarks, unfair competition, defamation and privacy, but he eventually will also have to keep in mind the laws and rules of all those other foreign jurisdictions where the Internet communication is likely to be published[3].

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[1] American Civil Liberties Union v. Reno [1996] E.D.Pa. 636, http://www.aclu.org/court/cdadec.html.
[2] *Visser*, (1999) 11 SA MercLJ, 268, 271, see below, 4.2.1.
[3] *Webber/Wentzel/Bowens*, http://www.wwb.co.za/docs/Brief_Aug98a_book6.htm, p. 2.

In a recent proposal by the commission for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market[4], it was stated, that it must be regarded as a problem that intellectual property law varies considerably from jurisdiction to jurisdiction[5]. As the Internet knows no boundaries, the law therefore should not either. But as every single country has its own laws, it is desirable that these laws provide a certain uniformity and harmonisation in regard to certain copyright matters in order to provide a global copyright protection on which any author can rely. Efforts in that direction have been made. In regard to computer programs uniform rules have been implemented into the Copyright Acts of the member states of the European Union. Further efforts are made in that direction. Internationally the TRIPS Agreement tries to establish an international standard; however in regard to the Internet, further endeavours will be needed. Internationalisation of copyright standards can also be reached by uniform interpretation of existing rules. In that regard, this thesis shall also serve as a source of inspiration for the South African lawyer who is to interpret and apply certain rules of the Copyright Act 98 of 1978.

1.2 Need of copyright protection for the author

The author's copyright is a right *erga omnes*. It has to be respected not only by the contracting party but by everyone. The author who has put a lot of effort into his creation needs protection. Otherwise there would be little incentive for the author to create works such as programs or literature which third parties could use. Authors must be –at least theoretically- put into a position to exploit their works economically[6]. But many authors do not only pursue financial interests; other elements such as self-fulfilment, reputation, fame, scientific interests, joy of work etc. give motivation to an original creation. Intellectual property laws serve to protect those interests worthy of protection and help the author to earn his merits, either material or immaterial. In that sense there is no basic difference between the Internet and other media.

1.3 Copyright laws also applicable in the Internet

Works which are protected under Copyright Acts and which are displayed in the Internet enjoy the same amount of protection as if they were displayed or reproduced by any other form of media. From the copyright lawyers view the Internet is only one of many means of publishing, distributing, displaying and reproducing works protected under the Copyright Act. That can be derived already from the fact that under German law works do not have to be embodied in order to receive copyright protection[7]. Legal aspects therefore stay the same regardless of the individual form of embodiment. What makes the Internet so special is that with the Internet the lawyer is facing a new form of sophisticated technology, whose special features need to be subsumed under the

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[4] Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (COM (97) 628 final, 10 December 1997.

[5] http://www.mmr.de

[6] One way of doing that is by means of establishing copyright industries: see: Survey of the U.S. Copyright Office, GRUR Int. 1985, 393.

[7] Fromm/Nordemann, 2, MN. 9. Different in South Africa, where the existence in a material form is condition for subsistence of copyright, see: *Dean*, p. 1-17 f., at 3.4.

existing laws[8]. However, one might even find that the existing law is not adjustable on the factual situation without bending the letter of the word over extend, so that adjustments need to be made and new rules added[9].

Another aspect in that regard has to be taken into account. There is a general rule, that the greater the extend of the readership or audience of a communication, the greater the damage suffered by the victim of any wrongful publication[10]. As the Internet works globally, it can be easily figured out, that quite a large number of persons may be reached, beyond that, what has been experienced so far by other 'traditional' means of communication.

1.4 Reason for protection – Internet contents as "public property"? Should there be copyright protection in the Internet?

As has just been shown, laws coping with copyright and related aspects are also applicable in the Internet. This must be regarded as the *status quo*. However, one can question, whether that given situation is in fact desirable. From different sides it has been argued, that there should be no copyright protection at all for those works displayed in the Internet, that the contents of the Internet should be regarded in some way or other public domain[11]. However, such an assumption must be rejected. Only because the Internet gives easier access than anything before to information and enables the user to copy contents of the Web within seconds and without loss of quality, there is no reason to declare the contents public domain. It has often been claimed, that copyright regulations state a big hindrance to the development of the net. But time has proved this argument to be wrong. It has been pointed out above, that copyright regulations also apply in the Internet and that was the case during all times of the existence of the Internet. Still though, the Internet has been constantly growing. Each single day, new persons get access to the Internet and each day new contents are made available to the public for downloading. It can be assumed, that in many cases author's would be reluctant to put their woks in the Web if they knew that their work would thereby enter automatically the public domain. If the latter would be the case, that could result into a situation, where the number of low quality publications in the Web would rise, whereas those, with high economic potential (which often comes with quality) would decrease, as the author had to fear the exploitation of his work by a third person.

Reasonably, the demand to declare the contents of the Internet public domain cannot be upheld without any qualification. One will have to agree, that certain regulations will have to apply in the Internet. But then, the question arises, which rules that are to be. A simple example might serve to enlighten the problem: A company decides to promote their services in the Internet by opening a Web site. This company will trust, that it can rely on trademark regulations, if anybody infringes their right of name or

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[8] *Van der Merwe*, Law of SA, Vol. 5 (3), p. 3, with reference to a Canadian government report entitled "the Internet Content-Related Liability Study".
[9] *Hofman*, Cyberlaw, p. 93, at 2.11.
[10] *Webber/Wentzel/Bowens*, http://www.wwb.co.za/docs/Brief_Aug98a_book6.htm, p. 2.
[11] *Van der Merwe*, SALJ 1998, p. 180, 195, who points out the problem, but does not give an opinion.

makes use of their logos and trademarks. If the Internet was completely public domain, the company would refrain from opening a Web site, as it had to fear the loss of certain goodwill assets. But, it must generally be assumed, that it is desirable, that as many Web sites as possible are made accessible through the Internet. Accordingly, many will agree, that trademark regulations must be applicable in the Internet. The same is true, with many other regulations. But what is then the justification, that certain rules are applicable and certain rules are not?

It also has to be asked, why certain people demand, that the Internet should be regarded as public domain. Regularly, the *bona fide* user of the Internet will be able to make use of the Internet without any major hindrances to gain and process the information he is looking for. Why should he then demand to declare the Internet contents to be public domain? It can also be assumed, that uncertainties in regard to the legal situation play an important role. The user, who is very good with computers, knows or fears that there are certain copyright related rules which he has to obey, while browsing through the Internet. However, he has no exact idea of what exactly these rules are. Accordingly, to demand that there should be no rules at all is much more convenient than making oneself familiar with the legal issues concerned. But that actually is a situation which one has to face every day and should not give reason to demand legal vacuums. It is true that the legal context is complex and not always easy to understand. But then it is on the lawyers to educate in that regard. Often, a thorough understanding of all legal matters is not even necessary. With some common sense a user will in many cases know whether he is infringing someone else's copyright or not. It also has been pointed out, that it is extremely difficult to enforce copyright on the Internet without losing the free flow of information[12]. This argument may be challenged in two ways: Firstly, the mere fact, that a law is difficult to enforce, does itself not give reason to get rid of the law as a whole. Many fields are known, where law enforcement has become difficult if not impossible, even though nobody would seriously think of eliminating existing provisions. Presumably, the same author would not demand that certain criminal provisions[13] are not to be applied in the Internet, even though they are similarly difficult to enforce. Secondly, the assumption, that effective copyright enforcement is impossible, must be regarded as a pure contention, which still needs to be proved.

To declare the contents of the Internet public domain would definitely be the wrong approach to encourage the growth of the Web. Those who predicted that copyright regulations and similar would be the graveyard of the Internet were proven wrong by time.

[1212] *Van der Merwe*, SALJ 1998, p. 180, 195.

[13] One might think here of pornography, defamation, etc. Note, that the German Copyright Act also contains criminal provisions. The same applies to the Counterfeit Goods act 37 of 1997, see: *Dean*, p. 1-135 ff.

To achieve a certain freedom in the Internet, the correct approach is rather to ask under which circumstances an implied licence can be assumed. In that regard, the concept of estoppel will have to play an important role.

2 Basics of Copyright Law

2.1 Intellectual property and computerprograms

§ 2 (1) Nr.1 UrhG mentions computerprograms as works protected under the German Copyright Act, the Urheberrechtsgesetz[14] (UrhG). Like all protected works they need to be personal intellectual creations (§ 2 (2) UrhG. As such they have to contain an intellectual content of some individuality, thereby excluding automatically generated programs or pure listings or tables[15]. However, the individual arrangement of such data can obtain copyright protection[16].

Under South African law computer programs were originally protected as literary works[17], as it is still the case in the U.K.[18]. By amendment s 2(1) of Act No. 125 of 1992 computer programs are now protected as a separate *sui generis* category of protected works by the Copyright Act 98 of 1978. Whereas German law does not hold a definition of computer programs, s 1 Copyright Act defines a program as a "set of instructions fixed or stored in any manner and which, when used directly or indirectly in a computer, directs its operation to bring about a result".

Until today under German law, it is not certain, which standard (*Gestaltungshöhe*) a computer program has to provide in order to reach copyrightability[19]. Under § 69a (3) UrhG[20] computer programs are subject to copyright protection if they are individual works in a way that they represent the result of a personal intellectual creation of the author regardless of any qualitative or aesthetic criteria[21]. In South Africa, in order to be eligible for copyright, a program has to be original in character, s 2 (1) Copyright Act. There is no definition of originality in the Copyright Act. In South Africa and the U.K. case law requires only that the work emanates from the

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[14] Gesetz über Urheberrecht und verwandte Schutzrechte vom 9. September 1965 = Act Dealing with Copyright and Related Rights.

[15] Schricker-*Loewenheim*, § 2, mn. 7.

[16] In Germany a company decided to put all German telephone directories on one single CD-ROM and sold it for only 49.- DM thereby gaining the data from the official phone directory from the Deutsche Telekom by scanning the pages. The Deutsche Telekom sued them for omission and damages. The Court decided that the company was prohibited from scanning the information, as the layout of the pages enjoyed copyright protection, but was not prevented from copying the data by simply typing, which the company eventually got done by low-cost workers in China.

[17] Northern Office Micro Computers (Pty) Ltd and Others v Rosenstein 1981 (4) SA 123 (C); Paven Components SA Ltd v Bovic CC and Others 1995 (4) SA 441 (A).

[18] *Smith G.J.H.*, p. 18.

[19] Originally, the German Federal Supreme Court (Bundesgerichtshof-BGH), set that standard very high in his two famous decisions, *Inkassoprogramm*, GRUR 1985, p. 1041, 1047 ff. and *Betriebssystem*, GRUR 1991, p. 449, 451; see also: *Bräutigam*, p. 119, 140 f.

[20] The §69a - §69f UrhG were implemented into the German Copyright Act in 1994 in transformation of an EC Directive on the Protection of Computer Programms; Directive 91/250/EWG, see GRUR Int. 1991, 545 ff.

[21] For further details see: *Brautigam*, p. 119, 141 f.

author himself and is not copied[22], therefore only a minimal amount of creativity is required[23]. Generally, mere facts are regarded as non-copyright[24]. Accordingly, already a very simple and banal program may be eligible for copyright protection under South African law, whereas that is not the case under German law. However, in praxis, Courts will not have to deal with that question, as simple programs will regularly not be object of a suit based on copyright infringement. Still though, the matter might be of some relevance when it comes to problems in regard to designs of Web pages, etc.

However, already the preparation work of a computer program can obtain copyright protection as drawings, plans, sketches etc., § 2 (1) Nr.7 UrhG. Under South African law the works produced in the earlier stages of the development of a computer program such as spreadsheets, flow charts or other writings made along the way may potentially be protected as literary works[25]. Under German law, for a work to achieve copyrightability it is not necessary to assign the work specifically to one of the categories of protected works mentioned in § 2 (1) UrhG. § 2 (1) UrhG only gives examples[26]. South African law, however, demands a categorisation of the work. A creation cannot be protected by the law of South African copyright unless it can be accommodated within one of the mentioned categories of works[27].

When dealing with the Internet and its various contents it is well possible to refer to different work groups, as later will be shown.

Under German law a work does not need to be embodied in order to gain copyright protection. Though, an embodiment is of importance when the right of reproduction and distribution is concerned. Single parts of a work also enjoy copyright protection. Different in South Africa: Copyright only comes into existence once it is recorded[28]. However, in regard to the Internet, the fixation requirement will be of little importance, as there will be regularly a fixation, as will be shown below.

Not protected are ideas, doctrines, rules or methods, as the Copyright Act shall not be a hindrance to evolution and further development[29]. However, the individual expression of an idea may be again protected[30]. § 69a (2) UrhG expressly protects the expression of a computerprogram, e.g. screen-displays[31].

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[22] University of London Press, Ltd. v. University Tutorial Press, Ltd. [1916] 2, Ch. 601, 608; *Copeling*, p. 48.
[23] *Smith G.J.H.* , p. 18; *Garnett/James/Davies*, p. 110, at 3-93.
[24] *Ibid.*
[25] *Dean*, 1-7, 1-13; *Van der Merwe*, Law of SA, Vol. 5 (3), p. 5.
[26] That can be derived from the word *insbesondere* = especially.
[27] Northern Office Micro Computers (Pty) Ltd & others v Rosenstein 1981 (4) SA 123 (C); *Dean*, p. 1-14.
[28] *Smith G.*, p. 18; Golden China TV Game Centre and Others v Nintendo Co Ltd 1997 (1) SA 405, at 413B (A).
[29] Hollinrake v. Truswell [1894] 3 Ch. at 427; Natal Picture Framing Co., Ltd. v. Levin [1920] W.L.D. 35, 36; *Fromm/Nordemann*, § 2, mn. 8.
[30] For further reference in regard to this discussion, see: *Van der Merwe*, SALJ 1998, p. 180, 184 ff.
[31] *Koch*, GRUR 97, p. 417, 418.

Not protected are programming languages, such as HTML[32], Java, Basic, Pascal etc., as they are regarded as generally not protectable methods that must be regarded as public domain[33].

Once a work can claim to be a personal individual creation it automatically enjoys copyright protection. Neither under German nor South African law it is necessary to register the work or mark the work with a copyright symbol such as a '©'[34]. But, when it is sometimes used, it can be deemed as simply declaratory[35].

2.2 The author and his rights

§ 7 UrhG gives a definition of the author. The author is the person who creates the work. Only natural persons can be authors. The author's employer is not an author[36].

German law grants the author different rights. There are moral rights[37], such as the recognition of the authorship (§ 13 UrhG)[38], the right of dissemination (§ 12 UrhG) and the right to prohibit any distortion of the work (§ 14 UrhG). In South Africa those moral rights are contained in s 20 Copyright Act. Germany knows an abstract enumeration of economic rights[39], such as the right of reproduction (§ 16 UrhG), the right of distribution (§ 17 UrhG), the right of exhibition (§ 18 UrhG), the right of recitation, performance, representation and presentation (§ 19 UrhG), the right of broadcasting (§ 20 UrhG), the right of communication by means of visual or sound records (§ 21 UrhG), the right of communication of broadcasts (§ 22 UrhG) and the right of adaptations and transformations (§§ 3, 23 UrhG). In contrary, South African sets those rights always in relation to a certain category of protected works.

South African law defines authorship individually in regard to the different categories of protected works. E.g. the author of a computer program is defined as "the person who exercised control over the making of the computer program" whereas the author of the of a literary, musical or artistic work is defined as "the person who first makes or creates the work"[40]. In regard to computer programs, that means, that actually not the one who provides the creative input and who physically types the data into a computer is the author, but the one, who co-ordinates the making of the program. Again, that definition pays tribute to the fact, that programs are often created by

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[32] Hyper-Text-Markup-Language; see also: *Hofman,* Cyberlaw, p.22.
[33] Schricker-*Loewenheim,* § 2, mn. 25.
[34] *Hofman,* Cyberlaw, p. 85; *Stroemer/Withoeft,* Urheberrecht und die Legende vom rechtsfreien Raum, p. 1.
[35] Without doubt, some German author's simply make use of it as they regard it as being 'trendy'. However, in the international usage there might be good reasons to use copyright-notices.
[36] But see the exceptions in s 21 (1) Copyright Act.
[37] Brautigam, p. 119, 123 ff.
[38] See also Art.6 *bis* Revised Berne Convention (RBC).
[39] Brautigam, p. 119, 120 ff.
[40] As computer programs before 1992 were evaluated as literary works, also a change of authorship occurred by the amendment of 1992 in regard to computer programs. Therefore, one has to look, whether the program was created before or after the amendment, as the author of a computer program as a recognised category of work might be a different person from the author of a computer program as a species of literary work; see also: *Dean,* p. 1-26.

teams[41]. Whereas European law recognises that fact by employing the term "rightholder" instead of "author", South African law reaches the same goal by giving a corresponding definition of authorship[42].

The South African Copyright Act draws a distinction between authorship of a work and ownership of copyright[43]. Although German law also knows that distinction, there is no use of a stringent terminology in that regard. The owner is sometimes referred to as the "Nutzungsrechtsinhaber" or "Rechtsinhaber", which may both be translated as 'rightholder', or, as in § 17 (2) UrhG, "des zur Verbreitung Berechtigten", 'the one entitled to distribution'. The word 'owner'. as "Eigentümer", however, is avoided, as ownership under German law is reserved to tangible assets.

In s 1 (1) (h) of the definiton of 'author' Copyright Act special provision is made for the authorship of computer generated works: The author of a literary, dramatic, musical or artistic work, or a computer program which is computer generated is the person by whom the arrangements necessary for the creation of the work were undertaken.

2.3 Joint-authorship

Program developing or the creation of a Web site are complex tasks which often involve a number of people. Therefore the issue of co-authorship regularly arises. Co-authors and authors of composite works are protected under §§ 8 and 9 UrhG. Co-authorship is given if two or more persons together have generated a personal intellectual creation. It is necessary that each one made a contribution and that that contribution cannot be exploited separately as it is part of the whole. Co-authorship is not given when a work, e.g. a program is subsequently adapted by another person to certain technical requirements such as specific computer languages or formats or if works are only made fit for display on a Web page. In the Internet the question of authorship and co-authorship may especially arise when companies ask for Web presence by asking a provider to create a web site to which both, company and provider contribute. The fact, that complex computer programs are regularly written by a number of persons, which haven often transferred their right of authorship to their employer, has been taken into account when the §§ 69a ff. UrhG were implemented into the German Copyright Act. Instead of author now the word "rightholder[44]" has been employed.

South African law does not hold an express provision in regard to co-authorship. Yet, ss 3. (1) and 21 (1) Copyright Act recognise joint authorship. Where two or more

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[41] *Smith, A.*, p. 82 at 31.2.

[42] But see: *Van der Merwe*, SALJ 1998, p. 180, 184, who obviously believes, that under South African copyright law in this context the terms "author" and "owner" cannot be further upheld and therefore prefers the term "holder".

[43] See: *Dean*, p. 1-28 ff.

[44] "Rechtsinhaber".

persons are engaged in the creation of a work in a material form, they can be joint authors[45].

2.4 The recognition of authorship

Under § 13 UrhG the author is free to determine whether the work is to bear his designation and what designation is to be used. Without the author's consent this designation may not be altered, § 39 UrhG. Whereas the right of recognition is not subject of disposition, the author may waive his right of designation by contract[46]. South African law also grants the author the right to claim authorship of the work[47]. However, the author is free to waive his moral rights and he can undertake not to enforce them[48]. These rights are also perfectly valid in the Internet. However, it is particularly easy to alter electronic documents, so that this right may easily be ignored.

When it comes to the creation of a Web site it has to be carefully examined who can be deemed to be author, as there may be, as already mentioned, a number of people involved. Often, the author is not the rightholder or copyright owner at the same time. As many Web services are provided by big companies, those are usually the rightholders to whom the author has transferred his economic rights as full or partly.

2.5 Compilations

§ 4 UrhG protects collections of works in the same manner as independent works. The South African Copyright Act does not know such an express stipulation. However, compilations, including tables and compilations of data stored or embodied in a computer or a medium used in conjunction with a computer, are regarded as literary works[49]. In the U.K., it is suggested[50], that items, which are compiled together need not either exclusively, or at all, themselves be literary material, so that a compilation may consist of a mixture of literary and artistic material, or even exclusively of artistic material[51]. Next to that, the items, which are assembled in a compilation may, individually, be entitled to copyright independently from the copyright in the compilation[52]. However, in South Africa, no jurisdiction can be found in order to back up this assumption, yet.

2.6 Other protected works related to the Internet use

When looking at the contents of the Internet one has to differentiate between pre-existing works, such as literary texts or pieces of music which are displayed in the Internet and those works which predominantly exist in connection with the Internet,

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[45] *Dean*, p. 1-24.
[46] Fromm/Nordemann, § 13.
[47] S. 20 Copyright Act.
[48] *Dean*, p. 1-65.
[49] See: s 1 (1) definiton 'literary work' para. (g) Copyright Act.
[50] *Garnett/James/Davies*, p. 62 at 3-14.
[51] See also: Art. 2 (5) Berne Convention., which requires protection to be accorded to collections of literary or artistic works, which, by reason of selection and arrangement of their contents, constitute intellectual creations.
[52] *Garnett/James/Davies, ibid.*

such as the design of a Web page[53]. Both categories enjoy the same amount of copyright protection[54], but displaying a pre-existing work in the Internet without the author's consent may already result in a breach. It follows, that a single Internet publication can involve liability to a number of different authors for copyright infringement in respect of each of the different underlying works, which compromise any single Internet presentation[55]. The composition of different works in the Internet is often referred to as mulitmedia.

In that context it has to be emphasised, that not any work, which is displayed in the Internet, must be regarded as a computer program. It is correct, that computer programs are *conditio sine qua non* for the use of the Internet. When looking at a Web site, router software and browser software provide configuration of the net and access to the sites. But next to these programs are still the 'classical' works as categorised by the Copyright Act. The relation between a computer program and another work has *Harms JA* in Golden China TV Game Centre and Others v Nintendo Co Ltd[56] in regard to a video game described as follows: "It was common cause that the video games are not computer programs although computer programs were used during their creation and although they may have been fixated by way of such programs." The Judge could therefore come to the conclusion, that a video game was a cinematograph film as defined by the Copyright Act, although the definition for cinematograph film states expressly at its end "[...], but shall not include a computer program". In general, it can therefore be said, that all different kinds of computer programs are employed in order to put a work into the Internet and to display it there, which, however, does not make the displayed work a computer program itself[57]. A text, written on a computer, still remains a text, although computer programs are used to make the writing possible.

Therefore, it shall be examined which pre-existing works as protected in both legal systems are mainly involved in relation to the Internet.

2.6.1 Literary works

§ 2 (1) Nr.1 UrhG and s 2 (1)(a) Copyright Act mention literary works as protected under the Copyright Act. On Web pages all kinds of literary works in big numbers can be found, such as contents of books, magazines, journals, papers, newspapers, speeches etc., etc.

There are also broadcasting services to be found in the Internet. The content of such a broadcasting-program may be also protected as literary work[58].

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[53] *Stroemer/Withöft*, http://www.firstsurf.com/stroeme4.htm, p. 2.
[54] *Webber/Wentzel/Bowens*, http://www.wwb.co.za/docs/Brief_Aug98a_book6.htm, p. 2.
[55] *Webber/Wentzel/Bowens*, http://www.wwb.co.za/docs/Brief_Aug98a_book6.htm, p. 3.
[56] Golden China TV Game Centre and Others v Nintendo Co Ltd 1997 (1) SA 405, at 415E (A).
[57] *Dean*, 1-10, fn. 35.
[58] *Koch*, Internet-Recht, p. 393.'

2.6.2 Musical works

§ 2 (1) Nr.2 UrhG and s 2 (1) (b) Copyright Act mention musical works[59]. Additionally, s 2 (1) (e) Copyright Act protects 'sound recordings', which under German law would fall under musical works. During the last couple of years the accessibility to musical works in so called 'sound-files'[60] by means of the Internet has become a growing concern of the music industry. Musical works, often copied from CD, can be offered in the Internet by anybody and downloaded by third persons[61] without any loss of quality due to digitalisation[62]. Music in the Internet is also used to accompany the presentation of web-sites or as part of video-games.

2.6.3 Artistic works

Under § 2 (1) Nr.4 UrhG and s 2 (1) (c) Copyright Act artistic works, such as architectural works, works of applied art and plans and sketches of such works are protected. In the Internet, all kinds of pictures are displayed, beginning at works of applied art to the creation of virtual figures as known from video-games, symbols, logos or, of growing importance, the representation of the so called 'Cyber-Space' using a threedimensional effect.

2.6.4 Cinematographic films

Cinematographic works as protected under § 2 (1) Nr.6 UrhG, s 2 (1) (d) Copyright Act may be transformed into a digitalized version and as such displayed in the Internet[63]. Digitalisation does not alter the copyright protection of the work[64]. As cinematographic works can be regarded video games as well as all kinds of films[65] and movies. As mentioned beforehand, in the South African case of Golden China TV Game Centre and Others v Nintendo Co Ltd[66], the Court held, that a video game qualifies for copyright protection as a cinematograph film, as the features of a video game match the Copyright Act's definition of 'cinematograph film', even though there are obvious deviations in regard to conventional films[67].

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[59] Schricker-*Loewenheim*, § 2, mn. 82.

[60] See: *Oppedahl/Larson*, http://www.patents.com/weblaw.sht#midi: Sound files are "MIDI, WAV and MP3 files [...] which, when played back through appropriate software and hardware, reproduce sounds, music, or voices. It is commonplace for the designer of a web page to include not only image (IMG) files to provide images, but also to include MIDI or WAV files to provide audio accompaniment for the page. A WAV or MP3 file can reproduce any audio information (e.g. Homer Simpson saying "Doh", or the entirety of a popular song as heard on the radio or on a compact disk), while MIDI files only reproduce that which can be played on a keyboard."

[61] *Hofman*, Cyberlaw, p. 23.

[62] *Hofman*, Cyberlaw, p.17.

[63] *Koch*, Internet-Recht, p. 992.

[64] *Koch*, GRUR 1997, p. 417, 418.

[65] If a cinematographic work does not meet the standard of protection as personal individual creation it might still be protected under §§ 95 to be read with 88, 90 – 94 UrhG as a related right.

[66] Nintendo Co Ltd v Golden China TV Game Centre & Others 1995 (1) SA 229 (T); Golden China TV Game Centre and Others v Nintendo Co Ltd 1997 (1) SA 405 (A).

[67] Golden China TV Game Centre and Others v Nintendo Co Ltd 1997 (1) SA 405, at 412G-H (A).

2.6.5 Illustrations of scientific or technical nature

To illustrations of scientific or technical nature, § 2 (1) Nr.7 UrhG, such as drawings, plans, maps, sketches, tables and plastic representations may also be counted the screen display[68], as well as the home page[69]. Under South African law these works may either be protected as literary[70] or artistic works. All kinds of scientific or technical illustrations may be displayed on Web sites.

2.6.6 Further works

Different than in German law, South African law knows further works eligible for copyright. These are broadcasts, programme-carrying signals and published editions, s (1) (f)-(h) Copyright Act.

2.7 How do works appear in the Internet?

Above, the works as mentioned by the Copyright Act were explained. Now it shall be determined in which form of appearance those works can be found in the Internet.

2.7.1 Home pages and Web pages

Regularly, a home page or any other Web page will qualify for copyright[71], if its different elements, such as design, text, audio and video captures and links will be sufficiently original[72]. Thus, the page as a whole, a part of the page as well as its different elements may enjoy copyrightability. Additionally, the selection and the arrangement of different pages can be original[73]. However, the *LG Düsseldorf*[74] has pointed out, that not any ordinary design of a web page will do, but that some individuality is required in order to make it distinguishable from any daily mass product. Originality may not be given where pages simply contain plain text or listings in alphabetical order. That might be different in South Africa. As already mentioned, the requirement of originality is somewhat eased in comparison to German standards. Under South African law, a work is original, if it is the product of the author's or maker's own labours and endeavours and is not copied from other sources[75]. Thus, a Web page can be protected as a literary work, an artistic work, an illustration of technical nature or, but also as a work collection (§ 4 UrhG), if different Web pages are arranged in a certain way or if different links are assembled on one page. Regularly, a Web page can be regarded as a compilation and as such will be protected as a literary work under South African law[76]. If the running of so called 'applets'[77] is concerned

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[68] See: Pastel Software v Pink Software (Pty) Ltd 399 JOC (T).
[69] *Koch*, Internet-Recht, p. 393 f.
[70] *Van der Merwe*, Law of SA, Vol. 5 (3), p. 6.
[71] *Koch*, Internet-Recht, p. 406.
[72] *Koch*, NJW-CoR 1997, p. 298.
[73] OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'* http://www.netlaw.de/urteile/olgd_2.htm
[74] LG Düsseldorf, Urteil vom 29. April 1998, 12 O 347/97 – *'Frames I'* http://www.netlaw.de/urteile/lgd_3.htm; confirmed by: OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'* http://www.netlaw.de/urteile/olgd_2.htm.
[75] Appleton & another v Harnischfeger Corporation & another 1995 (2) SA 247 (A); *Dean*, p. 1-15, with further reference to South African jurisdiction
[76] See above, 2.5.

that can be protected as the expression of a computer program (§ 69a (2) UrhG)[78]. The Web site itself is not a computer program and does not enjoy protection under the mentioned section[79].

The different elements of the page can attract protection as literary works, if a text is concerned, as artistic works if graphics are concerned etc. Sequences of pages can be protected as well as 'buttons', little moveable graphics that crawl over the page[80]. Under South African law, however, it is of paramount importance, that a correct categorisation of the protected work takes place[81]. As each Web page may be individually designed, the categorisation must be a matter of fact, depending on which features of the page or site are concerned.

Images of persons may enjoy a special protection beyond copyright law, as the person's personality right may be concerned[82].

Web sites can be exploited not only by copying them by computer. There are other ways of exploiting them, e.g. by copying and reproduction in print media or on TV-programs, by reproduction on CD-ROM etc.

2.7.2 Links and hyperlinks

The rule is that links and hyperlinks[83] serve as functional devices as they are not original[84]. However, in connection with certain arrangements, icons or designs[85], they may qualify for copyright. The act of establishing a link on a Web site itself does not concern the right of reproduction, but activating the link and thereby hoping to another site does so[86]. It is also possible that the structure as part of a specific linking system may be eligible for copyright protection as an illustration of technical nature[87].

Collections of links and hyperlinks, which are related to a particular topic are becoming more popular. The author of such a collection will search the Web for specific sites and unite the results on his home page by giving links to the relevant sites. As forming and updating such a collection may require a lot of time and effort

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[77] See below, 2.7.4.
[78] *Koch*, Internet-Recht, p. 407.
[79] OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'*; LG Düsseldorf, Urteil vom 29.April 1998, 12 O 347/98 = http://www.netlaw.de/urteile/index_urheberrecht.htm.
[80] *Ibid.*
[81] *Dean*, p. 1-14.
[82] Under German law that may be protected under § 22 Kunsturhebergesetz (KUG) as well as under § 823 Bürgerliches Gesetzbuch (BGB) = German Civil Code. For further reference see: Münchener Kommentar zum BGB, § 12, mn. 169 ff. In South Africa that is protected under the principle of right of privacy, as derived from the Roman law remedy *actio injuriarum*. For further reference see: *Dean*, p. 1-68 ff. See also: Bernstein v Bester NO 1996 SA 751 (CC).
[83] See below, 4.5.
[84] *Kochinke/Troendle*, CR 1999, p. 190 ff.
[85] *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 2.
[86] *Ibid*, p. 190, 193; *Koch*, Internet-Recht, p. 409.
[87] *Koch*, Internet-Recht, p. 408.

the author may charge those seeking access to his page[88]. A collection of links may be regarded as a compilation under German law (§ 4 UrhG) if the selection and arrangement is original[89]. South Africa will also protect a collection forming a compilation as literary work, if originality is given. That will be the case, if some labour, skill or judgement has been brought to bear on the work[90]. The amount of such labour, skill or judgement is a question of fact and degree in every case[91]. Accordingly, it will be a question of fact to judge, how much effort it had cost to compile the links. In that regard it has to be taken into consideration, that finding links in the vast width of the Web may not only be very time consuming, but that to establish a collection of real quality may often also require a large amount of judgement.

In case that a big collection of links does not feature originality it might still be regarded as a database[92]. As such under German law it might then be protected under §§ 87a ff UrhG. A collection generated by search engines such as Yahoo or Netsearch will not be original[93], as they lack the requirement of being a personal intellectual creation.

2.7.3 Uniform Resource Locator (URL)

The URL is nothing more than the address of a particular Web site. The content of the URL cannot or only partially be chosen by the user; it will be largely determined by the server. As such it already lacks of originality. Hence, the URL is not protected by copyright. That follows the rule that under German (and U.S.) law, short phrases such as titles and names are generally not copyrightable[94].

However, British Courts have even not excluded the possibility, that a single word can be a literary work and thus be subject of copyright[95]. But to qualify as literary work, the single word has to afford either information and instruction, or pleasure, in the form of literary enjoyment. In Exxon Corporation v Exxon Consultants International Ltd[96] the Court found, that this was not the case with the word 'Exxon'. Even though *Oliver LJ.*[97] found, that the name 'Exxon' is undoubtedly original, as "work or effort went into its invention and its selection as a suitable name for the plaintiff group [...]", the word would not qualify as literary work, as "[i]t conveys no information; it provides no instruction; it gives no pleasure [...]; it is simply an artificial combination of four letters of the alphabet which serves a purpose only when it is used in

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[88] *Bolin*, http://www.bitlaw.com/internet/linking.html, p. 2.
[89] OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'*, p. 4, http://www.netlaw.de/urteile/olgd_2.htm.
[90] Kalamazoo Division (Pty) Ltd v Gay and Others 1978 (2) SA 184, at 190B (C); Bosal Afrika (Pty) Ltd v Grapnel (Pty) and Another 1985 (4) SA 882, at 893B (C).
[91] Kalamazoo Division (Pty) Ltd v Gay and Others 1978 (2) SA 184, at 190B (C); with reference to Cramp and Sons v Smythson 1944 2 All E. R. 92 (HL) at 94.
[92] OLG Düsseldorf, *Ibid*; *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 2.
[93] *Bechtold*, ZUM 1997, 427, 429.
[94] *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 6; BGHZ 26, 52, 57 *'Sherlock Holmes'*.
[95] Exxon Corporation v Exxon Consultants International Ltd 1981 All E. R. 241, at 244.
[96] Exxon Corporation v Exxon Consultants International Ltd 1981 All E. R. 241.
[97] *Ibid*, at 249.

juxtaposition with other English words, to identify one or other of the companies in the plaintiff group". In the South African case Kinnor (Pty) Ltd v Finkel[98] *Levy AJ* also came to the conclusion by referring to the Exxon-case, that the word 'LePacer' was not eligible for copyright as it was "simply an artificial combination of letters of the alphabet [...] without any literary content". As a result, one may conclude, that even if there is in theory the possibility, that a single word might be eligible for copyright protection, that will in reality hardly ever be the case. Accordingly, as *Stephenson LJ* pointed out, the Exxon-case was the first time since the U.K. Copyright Act 1842 came into existence, that a Court was asked to hold that there could be copyright in a single invented word or name[99]. With some big amount of certainty, one may therefore also assume, that even under British and South African law, the URL or part of it may not be protected by copyright.

Again, there might be the possibility, that a number of URLs as a compilation of facts forms a database, that enjoys copyright protection or protection under the database directive[100] or as literary work in South Africa.

2.7.4 Java-Applets

A computer language which has a growing importance in relation to the Internet is *Java*. Minor programs based on *Java*, the so called *Java applets*[101], depend on a supporting online connection. The advantage of those applets is, that only the required part to run a certain feature needs to be downloaded and not the program as a whole[102]. As the program is never copied as a whole, it is actually not the act of copying a program which has to be taken into evaluation but rather the number of applications of the program.

2.7.5 Fonts

Not the single letter itself as established by the alphabet but the design of a font as a whole set may qualify for copyright. The design of fonts is stored in separate files[103]. If the set of fonts is original, it may qualify for copyright as well as the file containing those fonts. However, both has to be distinguished[104].

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[98] Kinnor (Pty) Ltd v Finkel JOC 352, at 361 (W).

[99] Exxon Corporation v Exxon Consultants International Ltd 1981 All E. R. 241, at 248.

[100] *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 3.

[101] An applet is a program designed to be executed from within another application. Unlike an application, applets cannot be executed directly from the operating system. With the growing popularity of object linking and embedding, applets are becoming more prevalent. A well-designed applet can be invoked from many different applications. Small Java applications are called Java applets and can be downloaded from a Web server and run on your computer by a Java-compatible Web browser, such as Netscape Navigator or Microsoft Internet Explorer. – Technical explanation taken from: http://webopedia.internet.com/TERM/J/Java.html.

[102] *Koch*, Internet-Recht, p. 409.

[103] *Watts/Blakemore*, Protection of Software Fonts in UK Law [1995] 3 EIPR 133.

[104] Under German law fonts may also be protected under the *Schriftzeichengesetz* and the *Geschmacksmustergesetz*, see: *Koch*, Internet-Recht, p. 410 for further reference.

2.7.6 Bulletin Board Systems

The menu of a Bulletin Board System (BBS) can likewise a homepage qualify for copyright under different aspects as expression of a computer program, as a collection or as an illustration of a technical nature[105].

2.7.7 E-Mail

Electronic mail can contain all kinds of files with protected contents. However, the difference to the Internet is that those files are not downloaded by the recipient but send by the sender who has to look after contents in regard to copyright protection under his own responsibility.

However, before the mail reaches the addressee it is stored by the online-provider before it is downloaded by its client. Therefore, the mail is reproduced at least twice. Already that act of reproduction may be regarded as a copyright infringement if works of third persons are contained in the mail which enjoy copyright protection[106].

3 WIPO and TRIPS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is part of the so-called WTO/GATT package of agreements concluded by member countries of the World Trade Organisation (WTO). In the field of intellectual property, there is another powerful international body, namely the World Intellectual Property Organisation (WIPO), which is an intergovernmental organisation and one of the 16 specialised agencies of the United Nations. It consists at present of 157 members. Traditionally, the WIPO was the body responsible for promoting and administering some 15 international treaties, *inter alia* the International Convention for the Protection of Literary and Artistic Works, called the Berne Convention, which was concluded in 1886, with a membership of 140 member countries. South Africa joined the Berne Convention in 1928.

Whereas the WIPO administered only certain aspects of intellectual property law and procedure amongst its member states, it was the WTO through the TRIPS Agreement which first managed to stipulate minimum requirements over the entire area of intellectual property law. Initially, there was some amount of competition between the two organisations. However, a co-operation agreement between the WIPO and the WTO was concluded in 1995, in terms of which a mutually supportive relationship and appropriate arrangements for co-operation were established, with reciprocal acess to information[107].

The substantive provisions of the Berne Convention, which must be regarded today as the pre-eminent international convention governing copyright law, have repeatedly been incorporated into international instruments. Art. 9 (1) TRIPS requires members of the WTO to comply with the substantive provisions of the Berne Convention. As

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[105] *Koch*, GRUR 1997, p. 417, 420.
[106] *Koch*, Internet-Recht, p. 411.
[107] *Du Plessis*, p. 2.

Annex 1C of the Marrakesh Agreement Establishing the WTO, TRIPS binds all members of the WTO. The agreement was concluded on 15th April 1994 and entered into force on 1st January 1995[108]. Currently, 134 States are members of the union.

On the 20th December 1996 in Geneva, the WIPO under the aegis of the UN agreed to two treaties, WIPO Copyright Treaty (WCT) and WIPO Performances and Phonogram Treaty (WPPT), and postponed a third[109]. Art. 1 (4) WCT similarly incorporates the Berne substantive provisions. However, no agreement could be reached as to new definitions of 'copying'[110], 'private/public' and 'publishing' in the digital age, as an agreement statement adopted by the Diplomatic Conference which adopted the WIPO Treaties said that the existing international rules were sufficiently wide to cover reproductions made in the digital environment[111]. The Treaties amend the 111 year old Berne Convention for the protection of Literary and Artistic Works and once ratified will need legislation. What still poses a problem in that regard are the cases of exemptions. Countries with a common law background know the fair use doctrine, whereas countries with a civil law background regularly define fair dealing more narrowly. Accordingly, the WIPO refrains from listing particular exceptions, but WIPO's three stage test of "certain special cases", which do not "conflict with normal exploitation of the work" and "do not unreasonably prejudice the legitimate interests of the author" are said in the Explanatory Memorandum to enable "[c]ontracting Parties to carry forward into, and devise new exceptions and limitations that are appropriate in the digital environment"[112].

In December 1996 the WIPO[113] protected computer programs internationally by Art. 4 WCT as literary works and databases as compilations of data by Art. 5 WCT (see also Art. 10 TRIPS). Art. 6 WCT grants authors of literary or artistic works the right of making the work available to the public. The availability can be provided either over wires or wireless: In that regard Art. 8 WCT[114] grants "...the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and a time individually chosen by them." However, it is not yet quite clear, how the term "public" has to be

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[108] *Visser*, (1999) 11 SA MercLJ, 268, 270.

[109] WIPO Copyright Treaty (WCT) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty - WIPO Doc 226 (E) (1997) Geneva. WIPO Performances and Phonograms Treaty (WPPT) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty - WIPO Doc 227 (E) (1997) Geneva. Web Site: http://www.wipo.org/eng/diplconf/distrib/89dc.htm

[110] Which could have provided an answer whether storage in the RAM can be regarded as a reproduction, see below, 4.1.1. See also: *Visser*, (1999) 11 SA MercLJ, 268, 271.

[111] See: Agreed Statements to the WIPO Copyright Treaty concerning Article 1(4). For further details, see: *Visser*, (1999) 11 SA MercLJ, 268, 269 ff.

[112] *Connolly/Cameron*, http://clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 12.

[113] Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, Geneva 2nd – 20th Dec. 1996, www.wibo.org/eng/diplconf/distrib/89c.htm.

[114] See also: *Wiederhold*, http://www.jura.uni-sb.de/jurpc/aufsatz/19990029.htm, p.5.

understood[115]. A work, first made available on the Internet automatically qualifies for Berne protection, regardless of its author's nationality[116].

Broadly speaking, the principles contained in the TRIPS Agreement are in accordance with those of the Berne Convention, Art. 9 TRIPS. TRIPS goes beyond the Berne Convention in providing for rental rights in respect of computer programs (Art. 11 TRIPS). Such rental rights entail, that the holders of rights in computer programs will have the exclusive right to authorise or prohibit commercial rental[117].

4 Exploitation of economic rights

Under both legal systems the copyright owner has the exclusive right to exploit his work in material form[118]. In order to do so the author may grant a license to another to utilize the work in a particular manner or in any manner without limitation[119]. The license may be granted as a non-exclusive right or as an exclusive right, § 31 (1) UrhG, s 22 (3)(4) Copyright Act. The license may be limited as to place, time or purpose, § 32 UrhG, s 22 (2) Copyright Act. Subject to that license may be any of the above mentioned economic rights or, under South African law, the rights mentioned in regard to each category of work.

However, it has already been pointed out that the rights mentioned by the German Copyright Act are only exemplary. It was deliberately taken into account that future technology and development may produce new means of utilization[120]. That can be concluded from § 31 (4) UrhG that states that a license purporting to grant rights with respects to unknown means of utilization (*Nutzungsart)*, and any obligation with respect thereto, shall have no legal effect. However, not any form of utilization may qualify as means of utilization in the above mentioned sense, as the granted right is an absolute right with effect *erga omnes*. Thus, it is necessary that there is a new form of utilization, which must feature the following: It must be distinguishable by technical standards, it must have a certain uniqueness and must have the potential of a separate economic exploitability[121]. In regard to already known means of utilization a new means of utilization has to have a 'plus' in regard to quality or quantity of the utilization[122]. Just a simple improvement of already known means is not sufficient. E.g. where the recording of a piece of music on a tape could be regarded as a known means of utilization, with the emergence of the compact disc the recording on a CD could be regarded as a new means of utilization. The author therefore could grant to one person the right to record the music on tape and to another person the right to record it on CD. - The proposition has been made to regard the use of the Internet as a new means

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[115] *Koch*, Internet-Recht, p. 423.
[116] *Visser*, (1999) 11 SA MercLJ, 268, 271.
[117] *Du Plessis*, p. 9.
[118] See: § 15 (1) UrhG; *Dean*, p. 1-33, at 7.1.
[119] *Dean*, p. 1-82, at 12.4., 1-84, at 12.10.
[120] Also referred to as 'means of exploitation'; see: *Garnett/James/Davies*, p. 260, at 5-86.
[121] BGHZ 95 [1986], 274, 283 *'GEMA-Vermutung I'*; BGH, GRUR 1996, 212 *'Videozweitauswertung III'*; *Schricker*, §§ 31/32, mn. 26; *Fromm/Nordemann*, vor § 31, mn. 5: *Reber*, GRUR 1998, 792, 793.
[122] *Fromm/Nordemann/Hertin*, § 31/32, mn. 6.

of utilization. However, that has to be rejected. The use of the Internet has so many technical and economical facets that it is impossible to draw any limitations, which would make it clearly distinguishable by the normal view (*Verkehrsauffassung*)[123]. The use of the Internet can therefore not be regarded as a autonomous means of utilization so that further distinctions of same detail have to be made[124].

An important principle of German copyright law is the so called *Zweckübertragungsgrundsatz* as stipulated in § 31 (5) UrhG: If the terms of the license do not specifically enumerate ways in which the work may be used, the scope of the grant of rights shall be determined in accordance with the purpose envisaged in making the grant. Therefore, when a right is granted, one must also ask for the purpose of the granting. As a result, situations may occur, where in fact several rights have been granted, although the parties have only agreed upon one right expressly. It has to be noted that for every single means of utilization a corresponding right has to be granted[125].

In that before mentioned regard, the South African Copyright Act does not hold a similar stipulation. As can be derived from s 22 (3) Copyright Act, the owner of copyright may transfer copyright piecemeal, so that one person may have the right to reproduce a particular work in magazines, another may have the right to reproduce the work on calendars, a third man might have the right to reproduce work on posters, and the original owner of the copyright may still retain ownership of the original painting[126], or, to put it more abstractly, the Copyright Act creates separate rights with can be dealt with separately[127]. Copyright is therefore sub-dividable into different modes of exploitation, as well as into exploitation for different purposes in relation to particular modes[128]. Problems may occur, when it comes to the question, which rights to which extend were actually transferred. In that regard, § 31 (5) UrhG offers some protection to the author, as it asks for the purpose of the assignment. As South African law does not hold such a provision, it has been warned, that an assignor should always take care, that the assignment is drawn in such a way as not to carry rights in excess of those intended to be assigned[129]. A further problem poses the question, whether an assignment includes rights, which are exercisable by means of technology, which were not known at the date of the assignment. A grant, made before the advent of a particular technology to exploitation by use of that technology has no legal effect under German law, § 31 (4) UrhG. In contrary, British law regards the question, whether a grant shall extend to future technology, as a matter of construction[130].

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[123] *Fromm/Nordemann/Hertin*, Vor § 31, mn. 5.
[124] *Koch*, Internet-Recht, p. 421; different opinion: *Koeve*, http://www.rackocve.de/Urheb.htm, who regards the use of the Internet as a "*Nutzungsart*" of its own, but without giving any reasonable argument; *Reber*, GRUR 1998, 792, 797; *Wiederhold*, http://www.jura.uni-sb.de/jurpc/aufsatz/19990029.htm, p. 8 ff.
[125] *Fromm/Nordemann*, § 31/32, mn. 15.
[126] *Smith A.*, p. 13; *Garnett/James/Davies*, p. 260, at 5-86 f.
[127] *Garnett/James/Davies*, p. 259, at 5-84.
[128] *Garnett/James/Davies*, p. 260, at 5-87.
[129] *Garnett/James/Davies*, p. 256, at 5-76.
[130] *Garnett/James/Davies*, p. 327, at 5-222.

Where no express provision to that regard is made in a contract, one will have to look at the parties' intention, whether they had such a possibility in mind[131]. Consequently, where a license to exploit a work has to be implied, it will extend no further than to acts which were in contemplation of the parties at the time and what was necessary to give business efficacy to the agreement[132]. Regularly, an implied license will therefore seldom, if ever, extend to technologies, which were unknown at the date of the agreement[133]. Another question, related to this, is, to which extend a certain right can be sub-divided, in order to assign it independently. In that regard, no proper reference from jurisdiction can be found. However, in order to exploit a right separately, it must be assumed, that more or less the same requirements have to be fulfilled, as established above by German Courts in regard to new means of utilization.

4.1 Right of reproduction

The right of reproduction may be considered as the 'key-right' of copyright protection[134]. It features prominently in the restricted acts in respect of the various categories of works of the Copyright Act. Under German law, the right of reproduction grants the author to make copies of the work, irrespective of method or number, §§ 15 (1) Nr.1, 16 (1) UrhG, whereas under South African law it is defined in relation to each category, s 1 (1) definition of 'reproduction' Copyright Act. The right of reproduction requires and embodiment of the work which must be perceptible by any of the human senses[135], i.e. the work has to be reproduced in any material form[136]. It is required that a fungible copy is produced. In regard to computers that requirement rises certain problems. It is therefore necessary to have a look at certain technical aspects of the Internet use.

4.1.1 Storage in RAM

It has been pointed out that the right of reproduction depends on an embodiment of the work in order to make it perceptible to any of the human senses in either direct or indirect form[137]. That demands a certain continuance of embodiment. However, as the perceptibility only has to be indirect it is sufficient that technical devices have to be used in order to make the work perceptible. Thus, already the physical fixation of a work may constitute a reproduction. In regard to computer programs, that means, that once a program has been saved on a disc or the hard drive of the computer there is a reproduction in the legal sense[138].

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[131] Hospital for Sick Children v. Walt Disney Productions Inc. [1966] 2 All E.R. 321, at 333C-D, 336C (Ch.D.); Hospital for Sick Children v. Walt Disney Productions Inc. [1967] 1 All E. R. 1005, at 1009H, 1010A (A); Serra v. Famous-Lasky Film Service Ltd. [1922] L.T. 109.
[132] Ray v. Classic FM plc [1998] F.S.R. 622 at 643.
[133] *Garnett/James/Davies*, p.328, at 5-223.
[134] *Garnett/James/Davies*, p. 392, at 7-08.
[135] *Fromm/Nordemann*, § 16, mn.1.
[136] *Dean*, p. 1-17, at 3.4.
[137] BGH, GRUR 1982, 102, 102 *'Masterbänder'*; BGH, GRUR 1983, 28, 29 *'Presseberichterstattung und Kunstwerkwiedergabe II'*; BGH, GRUR 1991, 449, 454 *'Betriebssystem'*.
[138] *Schricker/Loewenheim*, § 16, mn. 9.

One of the main features of the use of the Internet is the downloading of files and programs. Downloading involves at least saving the file in the computer's main memory RAM[139], but regularly also on the hard drive disk[140]. The opposite of downloading is uploading when a program is transferred to the server's computer. However, the program stays only for a certain, often very short period in the RAM. The question therefore arises how this does meet with the above mentioned requirement of continuance of the embodiment. In this context it has to be noted that the mere use of a work such as reading a book or seeing a film is not regarded as any relevant act in regard to copyright law[141]. Also, the mere screen display of program is not regarded as a physical fixation[142]. Therefore, one could argue, that simply downloading and running a program on one's personal computer would be the mere use of the work and not a reproduction. That question has given rise to a academic dispute of some dimension[143]. However, without repeating the numerous arguments exchanged by both sides it can be stated that the prevailing view among authors in accordance with the German Federal Court (BGH) comes to the conclusion that already the saving of the program in the RAM has to be regarded as a reproduction of the work. The main argument being, that with storage in the RAM there is complete and fixed copy of the program of which perfect use can be made[144]. This result was especially supported by introduction of § 69c Nr.1 UrhG which stipulates that the owner of the rights in a computer program has the exclusive right to permit or prohibit the permanent or temporary reproduction of a computer program or parts thereof by any means and in whichever form. The same seems to be true under South African law[145]. S 11B (a) mentions "[r]eproducing the computer program in any manner or form." As far as loading, displaying, running, transferring or storing the program involves a reproduction, such acts require the consent of the rightholder as well. Thus, it can be said, that § 69c Nr.1 UrhG and s 11B (a) Copyright Act cover practically any

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[139] Pronounced ramm, acronym for random access memory, a type of computer memory that can be accessed randomly; that is, any byte of memory can be accessed without touching the preceding bytes. RAM is the most common type of memory found in computers and other devices, such as printers. There are two basic types of RAM: Dynamic RAM (DRAM) and static RAM (SRAM) The two types differ in the technology they use to hold data, dynamic RAM being the more common type. Dynamic RAM needs to be refreshed thousands of times per second. Static RAM does not need to be refreshed, which makes it faster; but it is also more expensive than dynamic RAM. Both types of RAM are volatile, meaning that they lose their contents when the power is turned off. In common usage, the term RAM is synonymous with main memory, the memory available to programs. For example, a computer with 8M RAM has approximately 8 million bytes of memory that programs can use. In contrast, ROM (read-only memory) refers to special memory used to store programs that boot the computer and perform diagnostics. Most personal computers have a small amount of ROM (a few thousand bytes). In fact, both types of memory (ROM and RAM) allow random access. To be precise, therefore, RAM should be referred to as read/write RAM and ROM as read-only RAM. – Technical explanation taken from: http://webopedia.internet.com/TERM/R/RAM.html.

[140] Ocular Sciences Ltd. v. Aspect Vision care Ltd. [1997] R.P.C. 289 at 418.

[141] *Koch*, Internet-Recht, p. 420; *Braeutigam*, p. 143; *Smith G.J.H.*, p. 14.

[142] *Koch*, Internet-Recht, p. 428; obviously divergent opinion: *Webber/Wentzel/Bowens*, http://www.wwb.co.za/, p. 3.

[143] For further reference see: *Müller-Broich*, p.68 ff.

[144] *Koch*, Internet-Recht, 429.

[145] See *Smith A.*, p. 83: "Reproducing the computer program would simply amount to copying it or a substantial part of it, irrespective of the manner or the form in which it is copied."; see also: *Van der Merwe*, SALJ 1998, p. 180, 195, who points out the problem, but does not provide an answer.

kind of permanent or temporary reproduction, fixed or unfixed, of computer programs[146].

As a result, the downloading of a program must be regarded as a reproduction[147]. Thereby it is of none importance, which way the program took to enter the downloading computer: The program may be downloaded directly from a disc, online or on air, as the result always stays the same.

Browsing of a computer program regularly involves a direct saving to the hard disc so that a reproduction takes place without doubt[148]. No reproduction subject to copyright protection takes place while storage in the so called second-level cache[149] and proxy/browser cache[150].

4.1.2 Digitising and Scanning

To transfer a work which is not yet digitised into a digitised format must be regarded as reproduction subject to copyright protection[151], if the digitised format is put into a physical fixation. The same must be said about scanning: By scanning a digitised copy is produced thereby reproducing the original work. The act of scanning itself does not involve an original creation[152].

However digitising a work regularly involves a number of adjustments and alterations of the original work. The technique of digitising makes it particularly easy to work on a copy and to adapt it to different needs. E.g. by digitising the work is often put into a different format or compressed in order to adjust it to the requirements of the intended uses. Therefore, it can be asked whether under German law digitising constitutes an adaptation or transformation as set out in § 23 UrhG, which generally permits the

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[146] *Bräutigam*, p. 143; *Koever*, http://www.rackocve.de/Urheb.htm; see also *Garnett/James/Davies*, p. 427, at 7-58 in regard to the corresponding Art. 4 (4) EU Computer Software Directive.

[147] That result is shared by U.S. Courts, MAI Systems, Corp. v. Peak Computer, Inc. 991 F.2d 511 (9th Cir. 1993), *cert dismissed*, 114 S. Ct. 671 (1994); see also: *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 6, with further reference; *Mahony*, p. 417 with further reference; *Smith G.J.H.* p. 14; *Webber/Wentzel/Bowens*, http://www.wwb.co.za/, p. 3; unclear: *Hofman*, Cyberlaw, p. 87.

[148] *Koch*, Internet-Recht, p. 429.

[149] Pronounced cash, a special high-speed storage mechanism. It can be either a reserved section of main memory or an independent high-speed storage device. Two types of caching are commonly used in personal computers: memory caching and disk caching. A memory cache, sometimes called a cache store or RAM cache, is a portion of memory made of high-speed static RAM (SRAM) instead of the slower and cheaper dynamic RAM (DRAM) used for main memory. Memory caching is effective because most programs access the same data or instructions over and over. By keeping as much of this information as possible in SRAM, the computer avoids accessing the slower DRAM. Most modern PCs also come with external cache memory, called Level 2 (L2) caches. These caches sit between the CPU and the DRAM. Like L1 caches, L2 caches are composed of SRAM but they are much larger. – Technical explanation taken from: http://webopedia.internet.com/TERM/c/cache.html.

[150] *Koch*, Internet-Recht, p. 430 f.; different opinion: *Weinknecht*, p. 6, who is in favour of a reproduction.

[151] *Koch*, Internet-Recht, p. 431; see also: *Van der Merwe*, SALJ 1998, p. 180, 194, who points out the problem, but does not provide an answer.

[152] *Koch*, Internet-Recht, p. 431.

preparation of derivative works and only prohibits the distribution of such derivative works without the author's consent[153]. Adaptations as set out in s 1 (1) definition of 'adaptation' Copyright Act embrace translations. Although "translation" commonly means the turning of a work from one human language into another, it is suggested that the word is wide enough to include the conversion of a work into code or Braille[154], so that also the translation into a code of '0' and '1' can be regarded as an adaptation. In regard to computer programs § 69c Nr.2 UrhG, s 11B (f) (g) Copyright Act prohibit other parties than the rightholder to translate, adapt, re-arrange or otherwise alter a computer program and to reproduce the resulting derivative works. However, the original work is not a computer program and the digitised derivative might not be either[155], so that § 69c UrhG, s 11B Copyright Act may not be applicable. Still, the author must consent to the digitisation of his work. It has been pointed out that digitising must be regarded as a new means of utilization in the sense of § 32 (4) UrhG, which may be subject to a license of its own, § 32 (1) UrhG[156]. If the author gives his consent to digitising his work, in absence of any express stipulation, it can be assumed, that this consent also embraces the right of adaptation and transformation of the work as far as necessary for the reproduction (§ 31 (5) UrhG). Under South African law, that would be similarly a question of the parties' intention[157].

On an international level there have been efforts to protect temporary reproductions by introducing a corresponding article into the WCT. However, such a proposal failed due to resistance from U.S. service provider companies[158].

4.1.3 Downloading and uploading

It has been pointed out that downloading of a computer program involves necessarily a reproduction of the program. As a result, downloading is not possible without the rightholder's consent, § 69c Nr.1 UrhG, s 11B (a) Copyright Act. There might be an exception under § 69d (1) UrhG or s 19B Copyright Act. However, § 69d (1) UrhG will be in the majority of cases of none importance to the regular use of the Internet[159]. Displaying a program on a screen does not need the author's consent unless it involves a saving of the program[160].

Saving a program or a file on a data carrier such as a disc or CD-ROM or printing it on a piece of paper always involves a reproduction that is subject to the author's

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[153] *Schwarz*, V.1.3.
[154] *Garnett/James/Davies*, p. 466, at 7-142.
[155] See above, 2.6.
[156] *Koch*, Internet-Recht, p. 432 with reference to *Lehmann*, in: Lehmann, Internet- und Mulitmediarecht, p. 61 with further reference and *Hoeren*, in: Lehmann, Internet- und Mulitmediarecht, p. 134.
[157] See above, 4.
[158] *Vinje*, [1997] 5 EIPR, 230, 232; *Koch*, Internet-Recht, p. 438 f.
[159] In fact to date it is not clear how § 69d (1) UrhG has to be interpreted. Especially some retention can be noticed among authors and Courts when it comes to the question what has to understood under a "*bestimmungsgemässe Benutzung*"= *'use as directed'*. See also: *Müller-Broich*, p.
[160] Divergent opinion: *Webber/Wentzel/Bowens*, http://www.wwb.co.za/, p. 3, but without argumentative support.

consent. However, § 69d (2) UrhG, s 19B (2) (a) Copyright Act allow the production of a back-up copy, if required.

4.1.4 Uploading and the server's responsibility

Uploading involves a reproduction of the program on the provider's computer[161]. To this action the provider contributes simply by providing the host computer. Still, technically, that reproduction takes place on the provider's computer and not on the sender's. That rises a problem concerning the provider's responsibility for copyright infringements or material prohibited by law[162]. In fact, that problem has led to some major political discussion in Germany concerning the legal situation of service providers[163].

German Courts and authors[164] have argued that the server can be expected to check the content of uploaded files and pass on only those files that are unobjected. Again, there is the problem that this can only be done once the file is actually reproduced on the server's computer. Hence, a reproduction is unavoidable before a check can take place. It has been argued that the sender is aware to this fact. Therefore, it is the sender's obligation to check first whether his right of utilization includes the right to pass on the program for uploading[165]. Still though the server's responsibility to scan the files for illegal contents persists. If the server traces such an illegal content, e.g. a file containing a copyright infringement, he shall be obliged to delete the file and not pass it on[166]. In that context it has to be noted that the injured party may demand destruction of all copies under § 98 UrhG regardless to any fault (risk theory). That is not true in regard to routers[167] that only store and transport fragments of files.

4.1.5 Search engines

The vast contents of the Internet can only be exploited to a reasonable extend by the use of search engines. All big providers offer such search engines, e.g. Netscape offers Netsearch, then there are others as Altavista, Lycos, Yahoo, and Infoseek. These engines search the World Wide Web, reading one Web page after another and constructing concordances permitting later retrieval of the URLs[168] of Web sites containing words of interest. These search engines scan upon the user's request millions of Web sites and search them for certain catchwords. While doing so these pages are at least partially copied[169]. It is not possible, of course, to state as a general

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[161] *Schwarz*, http://www.jura.uni-tuebingen.de/~s-mos2/urheberrecht.html#Überschrift, V.1.1.

[162] *Webber/Wentzel/Bowens*, http://www.wwb.co.za/, p. 3, *Hofman*, Cyberlaw, p. 90, at 2.6.

[163] That concerned the case of one of Germany's major providers 'Compuserve'. The general director of Compuserve was held responsible for material with pornographic or fascist content which clients had uploaded to the server's computer.

[164] *Koch*, Internet-Recht, p. 435.

[165] *Ibid.*

[166] *Ibid*; AG Nagold, CR 1996, p. 241 = http://www.netlaw.de/urteile/index_urheberrecht.htm, '*Mailboxbetreiber II*'.

[167] See below, 4.1.10.

[168] Abbreviation of Uniform Resource Locator, the global address of documents and other resources on the World Wide Web. The first part of the address indicates what protocol to use, and the second part specifies the IP address or the domain name where the resource is located.

[169] *Ibid.*

rule whether such sites engage in activity that give rise to copyright liability, since each engine is programmed differently and the retrieved information is stored differently in each site. However, the sites searched are open for public access via Internet. Therefore the rightholder's consent to copying those sites by means of search engines can be assumed.

4.1.6 Remailing and cross-posting

When answering an e-mail and returning it to the sender often the original message is incorporated into the response. That form of remailing involves a reproduction of the work sent which has to be consented to. The same applies to the so called cross-posting where an e-mail is forwarded to one or numerous newsgroups. Where the sender has to expect such a forwarding, it can be generally assumed that the sender has given his tacit consent. However, that can only be true as far as the sender has not incorporated works or part of works of a third person into his message.

4.1.7 Designing a Web site

It does not need big emphasis to say that when designing a Web site the copyright of third persons has to be observed especially when making use of certain designs, pictures, photos, music and files.

4.1.8 When can the rightholder's consent to reproduction be assumed?

It has been argued that the one displaying a Web site in the Internet gives his general consent to reproducing this site[170]. In the Anglo-Saxon world this is often referred to as an implied license[171] or implied authorisation[172] or the issue is discussed under the concept of 'fair use'[173]. However, talking about an implied license under German law could be misleading. The author of a work or the holder of an exclusive license may grant non-exclusive licenses to third persons, §§ 31 (3), 35 UrhG. Instead of granting a non-exclusive license the rightholder may simply consent to certain actions *(Einwilligung)* which is not a license. The consent may thereby be given expressly or tacitly.

It will be the rule rather than the exemption that one has to deal with tacit consent or acquiescence. It is most obvious that the rightholder displaying a Web site in the Internet gives his consent to downloading and thereby reproducing the site. The *OLG Düsseldorf*[174] also decided that a rightholder displaying a Web site has given his consent that others offer links to his site[175]. However, things already get hairy when asking whether the rightholder also consents to saving the file on a disc or a similar

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[170] *Koch*, Internet-Recht, p. 437.

[171] *Garnett/James/Davies*, p. 321 ff.; *Oppedahl/Larson*, http://www.patents.com/weblaw.sht#midi; *Kuester/Nieves*, http://tklhr.com/articles/hyper.html, p. 2; *Smedinghoff*, p. 170.

[172] *Webber/Wentzel/Bowens*, http://www.wwb.co.za/, p. 3.

[173] *Hofman*, Cyberlaw, p. 88; for U.S. law see: *Field*, http://www.fplc.edu/tfield/copynet.htm; *Smedinghoff*, p. 173 ff.

[174] OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'*; LG Düsseldorf, Urteil vom 29.April 1998, 12 O 347/98 = http://www.netlaw.de/urteile/index_urheberrecht.htm.

[175] *Strömer/Withoeft*, Urheberrechte und die Legende vom rechtsfreien Raum, p. 3; *Weinknecht*, p. 4, who argues that a link is not more than a footnote.

medium once or several times. There is a general rule, that the implied license extends no further than the minimum which is necessary to give business efficacy to the contract[176]. The author might still consent to this when the purpose for doing so is strictly private. But already when the person starts exploiting the work economically[177] it is very likely that the rightholder does not consent any more[178] or wants at least participate in any profits.

In order not to encourage copyright infringements the evaluation when tacit consent can be assumed has to be treated restrictively. Even when there is an express consent the question of the consent's scope may arise. However, there must be also some burden on the rightholder's side: Who is suggesting by certain means to the public that he consents to downloading and copying certain works may create an estoppel when suddenly claiming copyright infringement[179]. It might be important to draw a distinction between the homepage and other following sites. It must be assumed that the rightholder always consents to entering the homepage[180]. But he may allow entering the following pages only after registration or subject to a fee.

When a message is posted to a public e-mail list, both forwarding and archiving seem to be impliedly allowed by the author. It is reasonable to assume that such liberties are unobjected if not explicitly forbidden. However, when forwarding, archiving or using part of a prior message to respond to an earlier message, the original meaning must not be changed[181].

When judging whether a specific consent is given, the determination always has to depend on the individual case. Thus it is not possible to give any general guideline beyond the said above.

When discussing the issue of tacit consent or implied license it is also heard that there is a waiver on the rightholder's side. However, under German law such a assumption cannot be taken into account. German copyright law does not know a waiver. Copyright may not be conveyed, § 29 UrhG. However, a waiver declared by the rightholder may be interpreted as a waiver not to pursue any copyright infringement[182].

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[176] Stovin-Bradford v. Volpoint Ltd [1971] Ch. 1007; R. & A. Bailey & Co. Ltd. v. Boccaccio Pty Ltd (1988) 77 A.L.R. 177; De Garis v. Neville Jeffress Pidler Pty Ltd (1990) I.P.R. 292 (Fed. Ct of Aus.); Ray v. Classic FM plc [1988] F.S.R. 622. See also: *Webber/Wentzel/Bowens*, http://www.wwb.co.za/, p. 3: "Of course, any license has its own limitations,..."

[177] See: BGH, Urteil vom 16. Januar 1997, I ZR 9/96, ZIP 1997, 749 – '*CB-Infobank I*' and BGH, Urteil vom 16. Januar 1997, I ZR 38/96, ZIP 1997, 755 – '*CB-Infobank II*' = http://www.netlaw.de/urteile/index_urheberrecht.htm. In that case a so called 'Infobroker' searched professionally the Net in order to pass on the Information to his clients. The Court decided that this was not a reproduction for private purposes according to § 52 (2) UrhG.

[178] *Hofman*, Cyberlaw, p. 89, at 2.5.1.

[179] *Garnett/James/Davies*, p. 322, at 5-211; with further reference to: Godfrey v. Lees [1995] E.M.L.R. 307; Ibcos Computers Ltd v. Mercantile Highlands Finance Ltd [1994] F.S.R. 275; Baillieu v. Australian Electoral Commission (1996) 33 I.P.R. 494 (Fed. Ct. of Aus.).

[180] *Koch*, Internet-Recht, p. 437.

[181] *Field*, http://www.fplc.edu/tfield/copynet.htm.

[182] *Weinknecht*, p. 5.

When coming to the conclusion that consent is given one has to remember that the rightholder's consent does not permit members of the public to do whatever they may please with the material found on a Web site. To draw analogies, the person who publishes a book is not granting to the public the right (by consent) to photocopy the entirety of the book and to sell the copies. The musician who releases a compact disk is not granting an implied license to set up a facility for copying the CD's and selling the copies[183].

Common sense suggests that if a webmaster has placed a copyright notice so that it is seen by visitors to a web site, then the webmaster probably is trying to communicate to the public that the contents of the site are not to be freely copied in all ways. Of course, as mentioned above, the absence of a copyright notice does not mean a site is not protected by copyright[184].

4.1.9 Limitations on copyright

§§ 69c UrhG and s 11B Copyright Act contain a catalogue of program related actions which need the author's consent. Certain limitations in special regard to computer programs can be found in §§ 69d and 69e UrhG, which will be of minor importance to the Internet user. Unlike many Anglo-Saxon states German copyright law does not know a fair-use doctrine or limitations concerning private or educational uses.

For works other than computer programs, like literary works, pictures, sketches, there are certain limitations concerning educational uses (§ 46 UrhG), broadcasting for school purposes (§ 47 UrhG), public speeches (§ 48 UrhG), newspaper and broadcasting commentaries (§ 49 UrhG), quotations (§ 51 UrhG) and private purposes (§ 53 UrhG). However, it has to be noted, that those limitations are not applicable to computer programs. Thus, even for private purposes the reproduction of a program is not permissible.

The Copyright Act makes provisions for a number of exemptions from copyright infringement, as it is assumed, that there is a public interest, that the copyright owner should not have a monopoly in regard to his work[185]. Above it has been stated that the authorisation in regard to downloading is not only discussed under the issue of an implied license, but also under the concept of fair dealing. However, there is an important difference between those two concepts. An implied license is legally a fully valid license without any restrictions; the owner of an implied license therefore does not infringe copyright. Opposed to that, the concept of 'fair dealing' is an exemption which is predicated on the assumption, that in principle an act of infringement has been committed and this act is then excused by the exemption[186]. The exemption of fair dealing[187] is stipulated in s 12 (1) read together with ss 15 (4), 16, 17, 19A and 19B

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[183] *Oppedahl/Larson*, http://www.patents.com/weblaw.sht#midi.
[184] *Ibid.*
[185] *Dean*, p. 1-51, at 9.1.
[186] *Ibid.*
[187] See also: *Hofman*, Cyberlaw, p. 87 f.

Copyright Act. In this regard it is important to note, that s 19B only refers to s 12 (1) (b) and (c) Copyright Act, so that the private use (s 12 (1) (a) Copyright Act) of a computer program is not regarded as fair dealing. Whereas the above mentioned exemptions in the German Copyright Act are strictly stipulated, the concept of fair dealing is a somewhat vague and indefinite one[188]. The latter has the advantage of being more flexible, as it puts the judge into a position to take all the circumstances of the potentially infringing act into account. Assessing, whether there is a case of fair dealing, South African Courts get some guidance from s 107 of the United States Copyright Act 1976, which list the following factors to be considered for the purpose of determining whether there is a case of fair dealing or fair use[189]: The purpose and the character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used and the effect upon the plaintiff' potential market. As far as this is concerned, the South African Internet user has an advantage to the German user. If there is a case of potential infringement, the German user will have to rise as a defence solely that an implied license was granted to him, whereas in South Africa one can additionally contend, that there is a case of fair dealing.

As the concept of fair dealing is not known to many countries, for the sake of internationalisation one should rather try to establish standards in order to determine under which conditions an implied license can be assumed than trying to enforce the concept of fair dealing. In fact, one will find, that in many cases the factors to be considered will be similar if not the same, as a number of circumstances have to be taken into account in order determine whether an implied license or an act of fair dealing can be assumed.

The Copyright Act also knows a number of further exemptions. Here to be mentioned are for instance the use for quotations, the use for illustrations for teaching or ephemeral copies[190].

4.1.10 Routing

Routing is the process of moving a packet of data from source to destination in internetworking. Files are not transported as a whole but split into packets and transported on different routes. Routing is usually performed by a dedicated device called a router connecting any number of LANs. Routers use headers and a forwarding table to determine where packets go, and they use ICMP[191] to communicate with each other and configure the best route between any two hosts. Very little filtering of data is

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[188] *Dean*, p. 1-51, at 9.2.3.

[189] Both terms are in fact synonymous, see: *Dean*, p. 1-51, at 9.2.3.

[190] For further exemptions, see: *Dean*, p. 1-53 ff.

[191] Short for Internet Control Message Protocol, an extension to the Internet Protocol (IP) defined by RFC 792. RFC is short for Request for Comments, a series of notes about the Internet, started in 1969 (when the Internet was the ARPANET). An RFC can be submitted by anyone. Eventually, if it gains enough interest, it may evolve into an Internet standard. Each RFC is designated by an RFC number. Once published, an RFC never changes. Modifications to an original RFC are assigned a new RFC number.

done through routers[192]. Once the packets arrive at there destination they are put together again as a complete file, a process called reassembly.

Routing is a key feature of the Internet because it enables messages to pass from one computer to another and eventually reach the target machine. Each intermediary computer performs routing by passing along the message to the next computer. Part of this process involves analysing a routing table to determine the best path[193]. The best path through the net is determined by the Routing Information Protocol (RIP)[194], a protocol that specifies how routers exchange routing table information. With RIP, routers periodically exchange entire tables. Because this is inefficient, RIP is gradually being replaced by a newer protocol called Open Shortest Path First (OSPF).

Routers do not care about the type of data they handle. Therefore the individual packet itself cannot be used as intended as it only contains an arbitrarily chosen part of data[195]. However, on its way to the target machine the packet often passes a number of intermediary computers where the packet is stored each time before being passed on to the next computer. In case that a computer program is sent each of that reproductions must be subject to the rightholder's authorisation, as § 69c Nr.1 UrhG, s 11B (a) Copyright Act also cover a program as part. Under German law, where the data is not a program but any other work, authorisation is not required as § 16 UrhG does not mention parts of works[196]. That is different under South African law, where the unauthorised copying of a substantial part forms a copyright infringement[197]. But, South African Courts found, that already small pieces of the work may be substantial[198].

Likewise in a router computer, a reproduction in the sense of § 16 UrhG does not take place for another reason: The packets sent must be regarded as fragments of a work. As the packets are formed arbitrarily and fully automatically they do not qualify as an original work and accordingly no fungible copy is produced[199]. A fungible copy is only produced in the target machine where the individual packets are reassembled. As a result *Koch*[200] deludes that fragmentation and reassembling of the data may not be regarded as utilizations subject to German copyright law. That argument can be transferred to computer programs. Even if § 69c Nr.1 UrhG also covers the reproduction of a computer program as part those parts cannot be used by any means[201]. Accordingly, in regard to South African law, these fragments cannot be

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[192] http://webopedia.internet.com/TERM/r/router.html.
[193] http://webopedia.internet.com/TERM/r/routing.html.
[194] *Koch*, Internet-Recht, p. 441.
[195] *Koch*, Internet-Recht, p. 439.
[196] *Koch*, Internet-Recht, p. 440.
[197] *Dean*, p. 1-37, at 8.3; *Hofman*, Cyberlaw, p. 87.
[198] *Van der Merwe*, SALJ 1998, p. 180, 191, with reference to: Galago Pulishers (Pty) Ltd & another v Erasmus 1989 (1) SA 276 (A); Fax Directories (Pty) Ltd v SA Fax Listings CC 1990 (2) SA 164 (D).
[199] *Koch*, GRUR 1997, 417, 425; *Nordemann/Goddarf/Toenhardt/Czychowski*, CR 1997, 645, 647; *Hofman*, Cyberlaw, p. 87.
[200] *Koch*, Internet-Recht, p. 441.
[201] Regularly it is even technically impossible for the router to check the contents of a packet.

regard as 'substantial' parts of the program. As a result it can be stated that no reproduction in the sense of §§ 16, 69c Nr.1 UrhG, s 11B (a) Copyright Act takes place when a packet is stored in a router computer. Therefore, routing does not require the rightholder's authorization. Nevertheless, it has to be remembered that a reproduction takes place when the fragments are put together in the target machine.

However, the act of fragmentising the data can be regarded as an adaptation and transformation of the work (§§ 23, 69c Nr.2 UrhG), which is subject to the rightholder's authorization. It must be assumed that with placement of a site in the Web the rightholder has consented to that action[202].

4.2 Right of distribution and right of publication

The right of distribution is stipulated in §§ 15 (1) Nr.2, 17 UrhG. It contains the right to offer to the public or to place in circulation the original work or copies thereof. In order to do so there must be a physical fixation[203] of the work on a medium. The right of reproduction does not include the right of distribution. Both rights therefore have to be treated separately. If the one who has a right to reproduce the work likes to distribute these reproductions a separate authorization by the author is required. However, § 32 (5) UrhG has to be observed, so that there might be situations where the right to distribute was impliedly granted together with the right of reproduction, if so envisaged by the parties. In regard to computer programs the right of distribution is stipulated in § 69c Nr.3 UrhG.

The South African Act does not know a right of distribution. However, there is a right of publication, which is somewhat more confined than the right of distribution under German law. The Copyright Act states, that publication of a work occurs, when copies of the work are issued, with the consent of the copyright owner, to the public in sufficient quantities, so as, having regard to the nature of the work, to satisfy the public's reasonable requirements, s 1 (5) (a) Copyright Act. Publication thereby is at first hand a specific requirement for copyright to subsist in a work[204] and not so much an economic right[205]. Still, the right to publish the work can be transferred to another person[206].

4.2.1 Online-transfer as a distribution or publication?

In special regard to the Internet the requirement of a physical fixation causes certain problems. Passing data on the Internet does not take place in a physical form as only electric currents are transferred. It has therefore been concluded that online transfer cannot be a distribution in the sense of § 17 UrhG[207]. It has also been shown that

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[202] *Ibid.*

[203] *Schricker/Loewenheim*, § 17, mn. 2.

[204] *Dean*, p. 1-19, at 3.6.

[205] For the difference between the right of publication and the right of distribution, see: *Garnett/James/Davies*, p. 448, at 7-106. Note that the U.K. has introduced the right of distribution by s 18 of the 1988 Copyright Act, see: *ibid*, at p. 447, at 7-105.

[206] *Dean*, p. 1-81, at 12.1.

[207] *Schricker/Loewenheim*, § 17, mn. 2; *Becker*, ZUM 1995, 231, 244; *Koch*, Internet-Recht, p. 442; *Koeve*, http://www.rackocve.de/Urhcb.htm; different opinion: *Weinknecht*, p. 3 f.

online transfer cannot simply be regarded as a new means of utilization[208] in the sense of § 31 (4) UrhG, as the requirement of physical fixation also has to be taken into account when it comes to the exploitation of a work[209].

As a result it can be stated that online transfer *de lege lata* cannot be simply subsumed under the existing German copyright law. However, as far as this is concerned some inconsistency has to be pointed out. There has been a big discussion which is still continuing about whether a computer program can be regarded as a thing in the sense of § 90 BGB[210]. The consequences of that discussion are the following: If one regards a computer program as a fungible thing one could relate the purchase of such a program to the rules of a contract of sale as stipulated in the §§ 433 ff. BGB. If one regards a program as a non-fungible thing one has to treat the corresponding contract as a contract about a license which is not expressly stipulated in the BGB[211]. The views are leading to different consequences when it comes to the law of liabilities. The German Federal Court (BGH)[212] regarded a program as a thing in the sense of § 90 BGB and therefore applied the rules of sale, §§ 433 BGB[213]. One of the main arguments was, that a computer program by any means necessarily is dependent of some sort of fixation to be used in the intended way. Accordingly, selling software on a disc or a CD-ROM is a contract of sale. But it is also possible to sell a computer program online just by transferring it on the Internet. Instead of getting a copy fixed on a medium directly from the seller the buyer would have to download the program first and then could copy it on a medium such as a disc or a CD-ROM. In the result the effect would stay pretty much the same. Accordingly the German Federal Court also regarded the online transfer as a sale[214]. §§ 17 (2), 69c Nr.3 UrhG contain the so called *'Erschöpfungsgrundsatz'*, the doctrine of exhaustion: If the original work or copies thereof have been distributed through sales thereof with the consent of the owner of the right of distributing the work for the area within the European Community, their further distribution shall be permissible within the Community. If a author sells his work on CD-ROM without doubt there is a distribution in the sense of § 17 (2) UrhG, so that the right would be exhausted. However, would the same not be true if the work was sold online, which is, as shown above, not a distribution in the sense of § 17 UrhG? Would in that case the buyer be prohibited from further distributing the work although he had a made a copy of it on a medium? It is obvious that at this point a contradiction occurs: It would be possible for the rightholder to circumvent the doctrine of exhaustion if he would sell his work exclusively online. Yet, that result would not comply with the reason of the norm. It cannot be true that the legislative body intended to grant a privilege to authors who prefer distributing their work online[215].

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[208] see above.
[209] *Koch*, GRUR 1997, 417, 425.
[210] See: *Mueller-Broich*, p.
[211] §§ 398 ff. BGB will be applied.
[212] BGHZ 102, 135, 140 ff.
[213] Interestingly enough does the German Federal Financial Court (BFH) not follow that view in regard to tax related matters.
[214] BGHZ 109, 97, 100 f.
[215] *Koch*, GRUR 1997, p. 417, 426.

To solve that unintended dilemma the following solutions are thinkable: By way of a wide interpretation of § 17 UrhG one could apply the section also to cases where a physical fixation during transfer does not take place. But that would result in a breach of a long tradition concerning the understanding of § 17 UrhG; the requirement of a physical fixation was supposed to be central element of that section[216]. Alternatively, one could think of *de lege ferenda* introducing a new section into the Copyright Act concerning the right of non-fungible transfer and non-public exploitation.

The first solution should be preferred. If one considers that at some point once the work arrives in the target machine, it will receive a physical fixation, usually first in the RAM, one should be able to ignore the fact that the actual transport itself cannot be regarded as physical. Also considering the reason of the norm it should be possible to come to such a conclusion without stretching its scope of application to wide, especially as the wording of §§ 17, 69c Nr.3 UrhG itself does not mention expressly the requirement of physical fixation[217]. At the time of the creation of § 17 UrhG one simply could not think of a way how a work could be distributed without fixation except broadcasting, which is expressly stipulated in § 15 (2) UrhG. Still though, a further distribution is only possible once the work has been fixed in the target machine. If one interprets the §§ 17, 69c Nr.3 UrhG in this way, without doubt the right would be exhausted once the work or program had been transferred.

A similar problem might occur in regard to the right of publication. S 1 (5) (a) Copyright Act mentions the issuing of copies of the work. The obvious application of this section is to permanent copies issued on tangible media[218]. So what happens, if the author of a work launches his work the first time by placing it in the Internet. Strictly speaking, a copy of the work would not be issued, as the person downloading the work would only create a copy in his own computer. That the technical ability to make a copy of a work itself does not always suffice the requirement of issuing can be seen from s 1 (5) (d) Copyright Act. For instance, a broadcasting of a work does not result into publication. Still, the person receiving the broadcast can make a copy of the work. But then again, one could argue, that, as making a work available for downloading is not mentioned in para. (5) (d) Copyright Act, it can be regarded as publication. However, the South African legislating body should consider the problem. By stating the exceptions of publication in para. (5) (d), it has been shown, that displaying a work to the public does not necessarily result in the publication of this work. So why should that be different with placing a work in the Internet for downloading? But then again, what has an author to do, if he wants to publish the work exclusively online? Here, a rule *mutatis mutandis* similar to para. (5) (b) Copyright Act could provide an answer.

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[216] *Koch*, Internet-Recht, p. 444 with further reference.
[217] *Ibid.*
[218] *Smith G.J.H.*, p. 22.

The Berne Convention protects a) both the published and unpublished works of authors who are nationals of members of the Berne Union and b) the works of authors who are not nationals or habitual residents of members of the Berne Union, but whose works are first published in one of those countries, or simultaneously in one of those countries and a country which is not a member state of the Berne Union, attachment in Art. 3 (1) Berne Convention[219]. There are two elements to the term "publication", namely making available a) copies of the work, whatever their means of manufacture, b) in such a way as to satisfy the reasonable demands of the public. In regard to the corresponding s 1 (5) Copyright Act there is the difference that copies do not have to be issued but simply made available. Consequently, making a work available on a Web page will automatically lead to publication of the work and even further in regard to the above mentioned stipulations it is published in every country of the world in which there is Internet access[220]. The WCT is silent on the question of publication. Still, as a new right of exploitation Art. 8 WCT knows a right of 'making available to the public'. However, that right still needs to be implemented into national legislation[221].

4.2.2 Rental and loan

Strictly speaking a rental or loan of a work or a program online is not possible. A work or a program subject to such a 'loan' is not returned like a book one is giving back to the lender. The lender keeps the work and what happens is that the other side makes a copy of the work. There is no need to return the work as the lender still has the work which is as good as the copy. What one could do instead of returning is deleting the relevant file. Still it is obvious that such an idea does hardly meet up with reality. For that reason the right of rental (and loan) was exclude from the doctrine of exhaustion in the §§ 17 (2) (3), 69c Nr.3 s.2 UrhG with implementation of the computer program related rules in the German Copyright Act. Loan is thereby regarded as a form of rental.

The South African copyright law does not know rental and lending rights. In the U.K. those were enacted by the 1988 Copyright Act[222].

4.3 Right of adaptations and transformations

Adaptations and transformations of computer programs are subject to the rightholder's authorization, 69c Nr.2 UrhG, s 11B (f) (g) Copyright Act. As far as other works are concerned, under German law adaptations and transformations are permissible but the publishing and exploitation of the result depends on the author's consent, § 23 UrhG. Exploitation is defined in § 15 (1) UrhG; as a result the reproduction of a work (§ 15 (1) Nr.1 UrhG) by downloading must already be regarded as an exploitation. An

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[219] *Visser*, (1999) 11 SA MercLJ, 268, 270.

[220] *Visser*, (1999) 11 SA MercLJ, 268, 271, with reference to: *Ginsburg J.C.*, Private International Law Aspects of the Protetection of Works and objects of Related Rights Transmitted through Digital Networks (report presented at a meeting of the Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of related Rights Transmitted through Global Digital Networks, convened by the WIPO in Geneva, 16-18 Dec. 1998) GCPIC/2 at 6.

[221] *Koch*, Internet-Recht, p. 387; *Visser*, (1999) 11 SA MercLJ, 268, 272.

[222] *Garnett/James/Davies*, p. 452, at 7-111.

adaptation is an alteration of the work which results into a new work of its own originality, § 3 UrhG, whereas a transformation simply involves any alterations of no original value itself as the original work is still prevailing[223]. Under South African law in regard to other works adaptations as defined by s 1 (1) definition of 'adaptation' Copyright Act are generally subject to the author's consent, as can be seen for instance by s 6 (f), s 7 (e) Copyright Act.

As pointed out digitising[224] a work can involve an adaptation. That includes not only the translation from an analog into a digital form but also the adaptation of already digitized works, e.g. music or pictures. Still, it has to be remembered that digitising always involves a reproduction of the work which is already subject to the rightholder's consent. Authorization is also required when links and hyperlinks are implemented into a Web site by others than the rightholder. It was also mentioned that fragmentising for the purpose of routing must be regarded as an transformation but not an adaptation as it does not involve any individual creativity[225].

Compressing of files must be regarded as transformation[226] as well as encoding a file or data. But, compressing and encoding does not evolve into a reproduction as no fungible work is produced[227]. However, the reverse way, decompressing and decoding produces a fungible piece of work so that there a reproduction takes place.

4.4 Broadcasting in the Internet

The right of publicly communicating, i.e. the right to publicly communicate a work in non-material form as set out in § 15 (2) UrhG includes the right of broadcasting, § 20 UrhG. As the word suggests publicly communicating requires that the communication of a work is public. That shall be the case if it is intended for a number of persons, unless such persons form a clearly defined group and are inter-connected personally by mutual relations or by relationship to the organiser, § 15 (3) UrhG. One of the big questions which arises in that context is whether the Internet can be regarded as 'public' in that sense. Traditionally the right of publicly communicating relates to broadcasting: A large number of persons are simultaneously able to receive a work by means of wireless reception. However, the number of persons as such is not a specific requirement[228], nor is the presence at the same time[229] or the actual reception[230]. But, downloading a program cannot be simply compared to broadcasting. Downloading happens on specific demand, the transfer takes place from point to point and is accordingly not accessible to the public. Consequently, there is no broadcasting in the sense of §§ 15 (3), 20 UrhG[231] as the numerous demands do not take place at the same time. Even by wide interpretation of the rule can downloading not be

[223] *Fromm/Nordemann*, § 23, mn.1.
[224] See above 4.1.2.
[225] See above, 4.1.10.
[226] *Koch*, Internet-Recht, p. 450.
[227] *Ibid.*
[228] *Schricker/v. Unger-Sternberg*, § 15, mn.29.
[229] *Becker*, § ZUM 1995, 231, 245.
[230] BGH, GRUR 1994, 45 f.
[231] *Schricker/v. Unger-Sternberg*, § 15, mn.22.

regarded as broadcasting as there is no way around the requirement of simultaneousness[232]. Any other result must be deemed *contra legem*.

Obviously, this opinion is shared by the German Federal Ministry of Justice. Therefore, a proposal to change the German Copyright Act was launched by the then Federal Minister of Justice *von Schmidt-Jortzig*[233]. A new § 19a UrhG shall be added, which stipulates a right of transfer[234]. The problem was made out, that the notion of 'public' in § 15 (3) UrhG does not compromise individual on-demand downloading possibilities. By the introduction of § 19a UrhG a clear distinction is drawn in regard to the right of broadcasting. Whereas the also to be altered right of broadcasting in § 20 UrhG would refer to the right to render the work accessible to the public by means of a program, § 19a UrhG would refer to the right to render the work accessible other than by program[235].

In South Africa the copyright in broadcasts is stipulated in s 10 Copyright Act. However, it can be assumed, that a similar problem does not pose itself, as the Internet transmission is excluded by the definition of s 1 (1) definition of 'broadcast' Copyright Act[236]. But then again, it must be asked whether there could not be a case of causing the broadcast to be transmitted in a diffusion service, as set out in s 10 (c), 1 (1) definition of 'diffusion service' Copyright Act. In fact, in the Scottish case Shetland Times[237] *Lord Hamilton* held that a Web site was *prima facie* a cable programme service. That case will be dealt with in some detail below.

4.5 Implementation of hyperlinks

Hyperlinks are elements in an electronic document that link to another place in the same document or to an entirely different document typically by clicking on the hyperlink. Linking documents is similar to placing references to other works in a printed text. One can regard hyperlinks as one of the most essential ingredient or the essence[238] of all hypertext systems, including the World Wide Web[239]. Links can be created easily by inserting a special code into a text or a graphic, a process known as inline-inserting. Technically it has to be noted that file *A* can be linked to file *B* without the author of *B's* knowledge or consent. It is also important to know that links always have to be related to a certain URL address. Links only work into one direction. If file *A* links to file *B* that does not mean that somebody starting at file *B* can trace back the way to file *A*. This is why the author of a document does and cannot know how many links there are to his file and where they come from.

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[232] *Koch*, Internet-Recht, p. 451 ff.
[233] http://www.bmj.bund.de/misc/urh_98.htm.
[234] http://www.bmj.bund.de/download.cntw.doc, p. 2 ff.
[235] http://www.bmj.bund.de/misc/urh_98.htm, p. 2 f.
[236] See also in regard to the U.K. Copyright Act: *Smith G.J.H.*: "It is unlikely that the braodcast provisions will apply to the Internet, which is essentially a telecommunications network."
[237] Shetland Times Ltd. v. Dr. Jonathan Wills and Zetnews Ltd., Scotland Court of Sessions, Edinburgh, (10/24/96), [1997] EMLR 277.
[238] *Kuester/Nieves*, http://tkhr.com/articles/hyper.html, p. 1; *Hofman*, Cyberlaw, p. 92, at. 2.8.
[239] *Kochinke/Troendle*, CR 1999, 190; *Bolin*, http://www.bitlaw.com/internet/linking.html, p. 1.

The most common form of a link is a HREF link (Hypertext Reference Link). An HREF link is activated when selected by the user, usually by clicking on it with the computer mouse. Thereby it has to be distinguished between three different types of links: *Intra-page links* connect different parts of the same file, *intra-system links* connect different files on the same server, whereas *inter-system links* connect different files on different servers.

4.5.1 Hyperlinking and economic rights

A great number of Web sites, especially homepages contain a number or collection of links. Inserting a hyperlink into a document, a home page or any other site itself does not lead to a reproduction. The act might be regarded as simply giving an reference to another site. No duplication takes place of neither the site it is linked to, nor any other file of the site. However, the link has to contain the URL of the file it is linked to, either visibly or invisibly. But, a reproduction of the URL is out of question, as the URL as an address itself does not qualify for copyright[240]. As the link does not affect the site it is linked to, neither an adaptation nor transformation takes place, either[241]. The right of distribution is not concerned as no copy of a work is made by the one creating the link, which could be distributed[242].

If a user activates a link by 'clicking' at the corresponding word or icon serving as a link, it has to be distinguished: In the case of a intra-page link one is simply moving within the same page, which leads to no further reproduction. However, intra- and inter systems links lead to different files. That file will be downloaded on the user's computer, which means that a reproduction in the legal sense takes place.

4.5.2 Deeplinks

Deeplinks are links, which bypass the homepage of a particular site and lead directly to subsidiary pages of the site. But, the home page may contain some relevant information regarding copyright issues. For instance, such copyright information may contain the restriction, that the following pages may not be exploited commercially. Often, the home page also contains the author's name, which might be relevant in regard to the right of recognition of authorship[243]. Deeplinking might have the effect that the user is actually not realising that he is leaving the original site and entering another site when activating the link. The commercial aspect might be, that circumventing a Web site's homepage may have a serious impact on that Web site's ability to generate advertising revenue[244]. Therefore an author might have a vital interest that deeplinks are avoided when it is referred to his site.

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[240] See above, 2.7.3.
[241] *Koch*, Internet-Recht, p. 466; *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 7 f.
[242] *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 8 f.
[243] *Hofman*, Cyberlaw, p. 89, at 2.5.2.
[244] *Erasmus*, p. 6, http://www.mbendi.co.za/werksmns/index.htm?page=/werksmns/net_law/guide03.htm.

4.5.3 IMG-Links

Whereas HREF links are activated by selection, IMG links (Image links) are automatically activated when the Web page is first loaded. Typically, this is done in order to 'call up' a graphic image stored in a separate file[245]. As the graphic is automatically loaded into the page, it is not on the user to activate the link. Regularly the user will not even notice that a link is being used[246]. The concept of using IMG links, which is also known as *mirroring*[247], can be used to build up a complex site just by referring to other sites. Technically, it has to be noted, that the file it is linked to is directly transferred to the user's computer, whereas the one who created the link does not receive a copy.

A reproduction therefore takes place in the user's RAM. The creator of the link does not reproduce the file[248]. When considering that the page created by using IMG links actually might be composed of many different works on has to ask whether a derivative work[249] is created by means of transformation or even adaptation, which is subject to the author's consent, once the derivative work is reproduced. In fact, that reproduction will invariably take place when the file is downloaded. Another problem arises when the IMG link refers to a Java-Applet[250], which is a computer program in the sense of § 69a UrhG. To create a link to a Java-Applet can already be regarded as an adaptation of the program[251]. But as the comprehensive § 69c Nr.1 UrhG already makes the act of adaptation and transformation subject to the rightholder's authorisation[252], already the creation of the link requires consent.

4.5.4 Frames

Frames work in the following way: When a user follows a link from *A* to *B*, *B* appears in a window framed by *A*. Framing is very interesting under a commercial point of view, as frames can be used to display *inter alia* logos and commercial advertisements surrounding the activated space[253]. Again, it is not always possible for the user to tell whether the framed content is from the link's creator or whether it is actually from a different page. It is also typical for a frame that the URL of the linked page does not appear; the contents of the secondary page are displayed under the URL of the framing page. Therefore it might not be possible for the user to go directly into the secondary site. Accordingly the frame's creator chooses which contents of the secondary site will

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[245] *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 3.
[246] *Koch*, Internet-Recht, p. 469.
[247] *Ibid*, p. 10.
[248] *Koch*, Internet-Recht, p. 468.
[249] *Koch*, Internet-Recht, p. 468; *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 10; *Bolin*, http://www.bitlaw.com/internet/linking.html, p. 2.
[250] See above, 2.7.4.
[251] *Koch*, Internet-Recht, p. 468 f.
[252] § 23 UrhG does not prohibit the act of adaptation or transformation itself, but makes the publishing or exploitation of the result subject to the author's consent. § 69c Nr.1 UrhG therefore grants further rights to the rightholder.
[253] *Erasmus*, p. 5 f., http://www.mbendi.co.za/werksmns/index.htm?page=/werksmns/net_law/guide03.htm; for the U.S. precedent, see: Ticketmaster Corp. v. Microsoft Corp. CV 97-3055 RAP (filed 4/28/97).

be displayed. But still though, it is the user who reproduces both the frame definition page as well as the linked content by downloading it. Again, framing may constitute a derivative work[254], which is subject to the author's consent, once a reproduction takes place.

4.5.5 Authorisation

It has been shown above, that in regard to hyperlinking there are a number of actions which may lead to copyright infringement, if they are proceeded without the rightholder's authorisation. However, as in most of the cases there will be no express authorisation, one again will have to operate with the concept of tacit consent or acquiescence.

When determining this, different factors have to be taken into account. First of all one has to look at the character of the site. If there are no specific information in regard to the rightholder's identity or no particular copyright remarks, it might be possible to assume that there is a wider consent as if a site is concerned, which contains logos, trademarks, copyright information etc. Then, it has to be observed, that in cases where IMG-links or frames are used, the user will often not know, that he has been linked to another file, so that an infringement by intent or negligence has to be rejected.

4.5.5.1 The Shetland Times Case

In a Scottish case, Shetland Times[255], the Court had to deal with deeplinks. The pursuer and defender were competitors. The Shetland Times is a newspaper, which carries local, national and international news. The defender, operating under the name The Shetland News, provides a news reporting service. The Shetland Times operates a site in the Internet through which it makes available many of the items in the printed version of the newspaper. Its homepage consists of a number of news headlines with embedded intra-site links to corresponding articles. On that home page, the Shetland Times envisaged to sell advertising space. The defendant's Web site contained a number of headlines, which served as links, that previously appeared in the issues of the Shetland Times. These particular headlines were *verbatim* accounts of the plaintiff's headlines. The inter-site links provided direct access to the corresponding text, that was published on the plaintiff's site, thereby bypassing the homepage of the pursuer, so that the potential advertising was avoided. The pursuer asked for a court order temporarily preventing the defender from maintaining the links, arguing that such links constitute copyright infringement[256].

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[254] Koch, p. 470. Dissenting view in regrad to U.S. legislation: Jackson, *ibid*; left open by: LG Düsseldorf, Urteil vom 29. April 1998, 12 O 347/97 – *'Frames I'* http://www.netlaw.de/urteile/lgd_3.htm; confirmed by: OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'* http://www.netlaw.de/urteile/olgd_2.htm.

[255] Shetland Times Ltd. v. Dr. Jonathan Wills and Zetnews Ltd., Scotland Court of Sessions, Edinburgh, (10/24/96), [1997] EMLR 277.

[256] Summary taken from *Lord* Hamilton, http://www.jmls.edu/cyber/cases/shetld1.html; *Bolin*, http://www.bitlaw.com/internet/linking.html, p. 4; *Kuester/Nieves*, http://tklhr.com/articles/hyper.html, p. 1; *Kochinke/Troendle*, CR 1999, 190, 195; *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 1 f.

The pursuer based its claim on two major grounds: Firstly, it was argued, that the headlines available on their web site were cable programs within the meaning of the U.K. Copyright, Designs and Patents Act 1988 s 7[257]. Secondly, it was also put forward, that the facility made available by the defender on their site was a cable program service within the meaning of s 7, so that the inclusion of those items constituted an infringement under s 20. Alternatively, it was maintained, that the headlines would qualify for copyright protection as literary works and were therefore capable of infringement[258].

The defender argued against that, that the process of Internet communication did not involve any sending of information as comparable to broadcasting. If there was any sending, it was done by the pursuer and not by the defender. The defender also tried to show, that they were not running a cable program service. The service they provided was an interactive one[259]. Accordingly, the exemption of s 7(2)(a) had to be applied[260]. It was also argued, that there was technically no copying or modifying of any works of the pursuer by simply providing a link to their Web site[261]. Additionally, it was contented, that the headlines, which consisted of a maximum of eight words, were not eligible for copyright protection[262].

The Court granted the interim interdict[263] on copyright grounds: *Lord Hamilton*[264] decided that there was an infringement based upon the United Kingdom's law governing cable television program providers. The Judge was able to apply this law as he held that the service provided by the defender was sufficiently like that provided by cable television. The service, the defender provided, would not fall within the exception of s 7(2)(a) of the Act: Even though the service was interactive, *Lord Hamilton* found, that this was not a primary function of the service, which was to provide news and other items. In fact he regarded that part as severable, which was not "essential" in the sense of the wording of s 7(2)(a) of the Act. He reasoned further that the articles were being sent by the pursuer (not by the defender!), but through the Web site maintained by the defender, so that as an effect the defender was interposing itself, like cable television, between the pursuer and the customers by routing the plaintiff's transmissions through its own Web site. That the information had to be demanded by a caller by 'clicking' would not preclude the information from being sent. As the home page of the Shetland Times, which contained the advertising, was bypassed, the Judge pointed out, that the value of the site to potential advertisers was significantly diminished. *Lord Hamilton* held that the headlines were further eligible for copyright

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[257] For the wording of s 7, see: *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 2.
[258] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 2.
[259] For "interactivity', see: *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 5 f.
[260] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 2.
[261] *Erasmus*, http://www.mbendi.co.za/werksmns/index.htm?page=/werksmns/net_law/guide03.htm, p. 5.
[262] *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 2.
[263] Under Scottish law 'preliminary interdict', under English law 'injunction'.
[264] *Lord Hamilton*, http://www.jmls.edu/cyber/cases/shetld1.html.

protection as they were sufficiently long, so that the copying of the headlines might be a violation of copyright law: "However, in the light of the concession that a headline could be a literary work and since the headlines at issue (or at least some of them) involve eight or so words designedly put together for the purpose of imparting information, it appeared to me arguable that there was an infringement, at least in same instances, of section 17.[265]" As a result, His Lordship came to the conclusion, that *prima facie* the incorporation by the defender in their Web site of the headlines provided at the plaintiff's Web site constituted an infringement of s 20 of the Act by the inclusion in a cable program service of protected cable programs.

The judgement was subject to some criticism. *Bolin*[266] remarks, that the judge ruled without a complete understanding of the technology involved and that he based the ruling on U.K. law governing cable television. He therefore deems the relevance of the decision to be unclear. In fact, on should be careful to regard the decision as a precedent. It has already pointed out above that the transfer of files in the Internet cannot be regarded as broadcasting[267]. It must also be assumed that the same applies to the U.K. law in regard to cable television, if one is reluctant to stretch the definition of "cable programme"[268]: *Smith*[269] has pointed out, that it is unlikely that the broadcast provisions will apply to the Internet, which is essentially a telecommunication network. The *Whitford Committee*, preparing the law governing cable television in 1977, could hardly have thought of the possibilities of the Internet[270]. That alone is not an argument against its application, as Acts coping with copyright related aspects are often designed to embrace future inventions and technologies, which at the time of drafting were not foreseeable[271]. However, *O'Donnell*[272] points out, that the language of the Committee's report clearly had in mind the conventional notion of television broadcasting. But then, the technologies involved in Internet communication can hardly be seen as a further development of television broadcasting[273]. It is generally accepted, that an interpretation of a law *inter alia* has to take the legislator's intention into account. Therefore it is questionable, whether one should really have employed those regulations in the given case. The Judge also failed to give satisfying respond to the problem, that it is in fact the user, who is reproducing the site and not the defender. It is therefore not clear, at which point the actual infringement occurred[274].

It therefore would not be surprisingly, if a more thorough examination of the technology and the law involved would lead to the conclusion, that the law governing cable television is in fact not applicable[275]. Even then, it is questionable, whether some

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[265] *Lord Hamilton*, http://www.jmls.edu/cyber/cases/shetld1.html. p. 4.
[266] *Bolin*, http://www.bitlaw.com/internet/linking.html, p. 2.
[267] See above, 4.4.
[268] *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 3 ff.
[269] *Smith G.J.H.*, p. 23.
[270] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 4.
[271] Golden China TV Game Centre and others v Nintendo Co Ltd 1997 (1) SA 405, 412 D-E.
[272] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 4.
[273] *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 3 f.
[274] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 4.
[275] *Ibid*, p. 24 and 27.

information has been "send"[276]. One could also ask, whether the reproduced headlines were "cable programmes"[277]. In fact, one could assume, that even *Lord Hamilton* considered, that a closer examination would lead to a different result, as he stated: "The resolution of the above issues may in the end turn on technical material not available to me at the hearing of the interim interdict. On the information that was available and on the basis of the arguments presented, the pursuers have, in my opinion, a *prima facie* case that the incorporation [...] constitutes an infringement of section 20 of the Act [...].[278]"

Subject to much criticism has also been the evaluation of the headlines as literary works[279]. Even though the standard of 'originality' for a work to be eligible for copyright protection in the U.K. (and South Africa) might be lower than in other EU countries[280], there are certain qualifications, which have to be complied with. As *Lord Hamilton*[281] has pointed out, literary merit is not a necessary element of a literary work. In University of London Press v. University Tutorial Press[282] *Peterson J* defined a literary work as "work which is expressed in print or writing irrespective of the question whether the quality or style is high". Taking that into account, one probably could regard a headline, as it was copied by the defender "Bid to save centre after council found 'cock up'" as a literary work. However, *O'Donnell*[283] has brought into remembrance, that the U.K. copyright law knows a *de minimis* principle, which serves as a controlling mechanism regarding eligibility for copyright status[284]. In the case of Exxon Corp. v. Exxon Insurance Consultants International Ltd.[285] *Stephenson LJ* quoted with approval the dictum of *Davey LJ* delivered in Holinrake v. Truswell[286], that a "literary work is intended to afford wither information or instruction, or pleasure, in the form of literary enjoyment". In that regard, *O'Donnell*[287] states: "While the headline in this case certainly acted as a precise informational pointer in respect to the substance of the story, this will not always be the case and it may be that in borderline scenario more delicate handling will be required by the judiciary."[288] She further adds, that *Lord Hamilton* obviously stuck to the rule of thumb, that "what is worth copying is worth protecting[289]". However, *O'Donnell*[290] shows, that there are

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[276] *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 6.
[277] *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 6 f.
[278] *Lord Hamilton*, http://www.jmls.edu/cyber/cases/shetld1.html, p. 3.
[279] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 4 f.; *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 2 f.
[280] See above, 2.1.
[281] *Lord Hamilton*, http://www.jmls.edu/cyber/cases/shetld1.html, p. 3.
[282] University of London Press v. University Tutorial Press [1916] 2 Ch 601, 608.
[283] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 4. See also: *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 8 f., with further reference to jurisdiction.
[284] See for instance: Francis Day v. Twentieth Century Fox [1940] AC 112.
[285] Exxon Corp. v. Exxon Insurance Consultants International Ltd. [1982] Ch 119, 143.
[286] Holinrake V. Truswell [1894] 3 Ch 420, 428.
[287] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 4.
[288] In the same sense: *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 3.
[289] University of London Press v. University Tutorial Press [1916] 2 Ch 601, 610.
[290] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 5.

various objects to that point of view, especially in regard to the journalistic world[291]. Besides, that notion has to be scrutinised in special regard to hyperlinks. If the Shetland News used those headlines to link to the articles of the Shetland Times, the *verbatim* reproduction was not made, because one considered the headlines worth copying in regard to its original content, but simply by reason of convenience and efficiency. In fact, that will be almost always the case, when a hyperlink is created.

O'Connell also raised another interesting point. *Lord Hamilton*[292] found, that there "was, in the circumstances, no substance [...] in the suggestion, that the pursuers were gaining an advantage by their newspaper items being made available more readily through the defender's web site". *O'Connell*[293] doubts that notion, as she contends, that the business of advertising was secondary to the newspaper the pursuer ran. Even if that might not be correct, as advertising definitely has become a very important issue for newspaper publishers, one should ask, whether *Lord Hamilton's* assumption is true in the way, that there is no advantage for the pursuer. By activating the link, users gain access to a page, from which they beforehand might not even have known it existed. The one, making use of the defender's site, will suddenly notice, that there is actually another newspaper next to the Shetland News. Being on the site of the Shetland Times, once his interest has been arisen, he might look further by actually going to their homepage[294]. Once there, he might eventually stay within the site of the Times instead of going back to the News. – I believe, that should be advantage enough. Even more, although one has to be careful to argue with technical possibilities when regarding copyright cases, it must also be pointed out, that the pursuer could easily have displayed advertising on *each* page of their site by using frames[295]. In that case, the advantage would have been obvious.

Cameron/Connolly[296] also ask, whether there was not an implied licence to create deep links. One can argue, that when a Web site owner creates a site and puts information on it, then he impliedly consents to its use by others. *O'Donnell* believes, that this was the case, as the pursuers "were sufficiently *au fait*" with the workings of the Internet or at least with the operation of search engines[297].

Oppenheim[298] further believes, that the linking in the given case falls within the notion of 'fair dealing' as provided in s 30(2) of the Act, as the pursuers have suffered no

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[291] For further detail, see: *O'Donnell, ibid.*

[292] *Lord Hamilton*, http://www.jmls.edu/cyber/cases/shetld1.html, p. 4.

[293] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 5.

[294] Usually, every subsidiary Web page nowadays contains an intra-site link, which leads to the homepage. See also: *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 9.

[295] This is usually done by newspapers on the Web. See for instance the three following German newspapers: http://www.welt.de; http://www.sueddeutsche.de; http://spiegel.de.

[296] *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 10 f.; *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 5; *Smith G.*, p. 27.

[297] Also: *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 3 f.

[298] *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 3; see also: *Cameron/Connolly*, http://www.clj.warwick.ac.uk/jilt/copright/98_2conn/connolly.htm, p. 9.

financial damage and the copying is for a permitted purpose, namely for the purpose of 'reporting current events', s 30(3) of the Act.

The outcome of the decision is unclear as well: Is linking in general prohibited, is there a duty always to link to homepages[299] or is there such a duty only if there is advertising on the home page? It has also been said above[300], that titles do not easily qualify for copyright. That might especially be the case with newspaper headlines, where often the facts already determine the content of the headline. The legal effect would be, that each individual headline has to be scrutinised in order to find out, whether there could be a case of copyright infringement. Altogether it must be stated, that the judgement is not very satisfactory in regard to its outcome, even if it can be understood, how the judgement came together. After all, it has to be taken into account, that the Judge hold, that the newspaper web site was *prima facie* a cable program service. *Lord Hamilton* had to make his decision on limited evidence. No detailed technical information was put before him in relation to the electronic mechanism involved[301] and in regard to the special character of an interim interdict he did not have to bother, that this information was put forward to him. Also, the procedural particularities of an interim injunction have to be considered: All the Court considers is, whether there is an issue to be tried[302]. As reason of fairness, it also has to be pointed out, that the defender's Counsel eventually failed to put up a proper defence[303]. Accordingly, *Smith*[304] is of the opinion, that it is certainly not clear, that the Judge held there was *prima facie* case, that the links (as opposed to the headlines) constituted infringement[305]. It must be asked, whether it would not have been possible in the given case to come to a more comprehensible ruling by employing the laws against unfair competition[306].

In the legal community it was anticipated, that the case would go to a full hearing at Proof. Unfortunately, the case was settled between the parties in November 1997[307], so that further patience will be required.

4.5.5.2 Conclusion in regard to hyperlinks

It has been argued above, that the one who displays a site in the Web gives his general authorisation to downloading and thereby reproducing the site[308]. In cases, where a HREF-link links directly to a homepage authorisation must be assumed as it makes no

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[299] *Erasmus*, http://www.mbendi.co.za/werksmns/index.htm?page=/werksmns/net_law/guide03.htm, p. 7.
[300] See above, 2.7.3.
[301] *Lord Hamilton*, http://www.jmls.edu/cyber/cases/shetld1.html,p. 3.
[302] *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 2.
[303] *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, shows, that in regard to various aspects, further legal arguments could have been raised.
[304] *Smith G.*, p. 26.
[305] See also: *Koch*, NJW-CoR 1998,p . 45, 46, fn. 19.
[306] In fact, when the Judge considered the aspect of 'advantage', that might indirectly already have been the case.
[307] *Koch*, Internet-Recht, p. 473, fn. 447.
[308] See above, 4.1.8.

difference whether one enters a site directly or by activating a link[309]. *Jackson*[310] has pointed out correctly, that the ability to create or follow a link gives the public the widest possible access to information and is therefore to the public's benefit. *Oppenheim*[311] describes linking both as "the *raîson d'étrè* of the WWW and the reason for its success"[312]. According to him, linking is "custom and practice" in the Web. Consequently, one must come to the conclusion, that even when a deeplink is concerned, consent can be assumed[313]. As has been argued above[314], it is extreme to say that contents of the Internet should be regarded as public domain. On the other hand it would be extreme to say, that the one displaying a site in the Web is allowed to make all reproductions of his site subject to his express permission. Here, the institute of estoppel[315] has to be taken into account. The rightholder of a site can generally expect that deeplinks will be used as reference to his site. Correspondingly, it is on him to make sure that the user gets the information he believes he should get. For instance, that could be done by using frames or intra-site links, which lead to the home page of the given site.

4.5.5.3 OLG Düsseldorf: *'Frames II'*

Recently, German Courts had to deal with links and frames[316]. Thereby the defendant linked users to the plaintiff's site. The plaintiff's site appeared within a frame designed by the defendant containing the defendant's name and further links. The pursuer contended that his derivative right (§ 23 UrhG) was infringed, as the defendant transformed the site by linking to it without having the necessary authorisation. However, the Courts did not have to answer that question, as they ruled, that the pursuers site did not qualify for copyright and consequently could not be transformed. The pursuer also tried to pursue their point claiming an act of unfair competition according to §§ 1, 3 UWG[317]. The OLG Düsseldorf [318] also rejected this argument, saying that the one displaying a Web site in the Internet has to expect that a link is

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[309] *Bolin*, http://www.bitlaw.com/internet/linking.html,p. 2; *Koch*, Internet-Recht, p. 467, but without drawing a distinction between 'ordinary' hyperlinks and deeplinks.

[310] *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 13.

[311] *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 3.

[312] That linking is regarded as very essential can also be retrieved by the fact that in Germany even an initiative was founded, named 'Freedom For Links', see: http://www.freedomforlinks.de/.

[313] *Jackson*, http://www.law.indiana.edu/fclj/pubs/v49/no3/jackson.html, p. 13; *O'Donnell*, http://webjcli.ncl.ac.uk/1997/issue3/odonn3.html, p. 6; *Oppenheim*, http://www.shetland-news.co.uk/editorial/profopp1.html, p. 3; divergent view obviously: *Kochinke/Troendle*, CR 1999, 190, 191, but without explanation.

[314] See 1.4.

[315] See also: Film Investors Overseas Services Sa v. Home Video Channel Ltd. (T/A The Adult Channel) 1996 93 (44) L.S.G. 30., where it was held, that it would be unconscionable for the plaintiff to be permitted to deny that which they had allowed or encouraged the defendant to assume to their detriment.

[316] LG Düsseldorf, Urteil vom 29. April 1998, 12 O 347/97 – *'Frames I'* http://www.netlaw.de/urteile/lgd_3.htm; confirmed by: OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'* http://www.netlaw.de/urteile/olgd_2.htm.

[317] Gesetz gegen den Unlauteren Wettbewerb vom 7. Juni 1909 (UWG) – Act Against Unfair Competition.

[318] OLG Düsseldorf, Urteil vom 29. Juni 1999, 20 U 85/98 – *'Frames II'* http://www.netlaw.de/urteile/olgd_2.htm

created to his site and generally consents to it[319]. The Court added, that in cases where the linked page contained advertising, links had to be deemed as welcome, as they would contribute to a further distribution of the advertising. – However, it has to be noted, that in the given case the frames where used in a way, that the user would always notice that he was entering a different site, as the URL of the pursuer was not hidden[320]. It therefore has to be asked whether the Court's decision would have been different, if that would not have been the case. Especially in regard to § 3 UWG [Deceptive Advertising], which refers to deceptive statements concerning business matters, things could show out differently, when the user is actually led to believe, that the creator of the link is also the creator of the linked site. It is also worth noting, that the defendant mentioned the technical possibility to prevent frame links by using so called 'frame-killers'. Still, the Court did not respond to that argument.

4.5.5.4 Conclusion in regard to frames and IMG-links

Even though in the given case decided by the OLG Düsseldorf the requirements for a successful suit based on the law of unfair competition were not met, the Court made clear that in general there might well be much room to employ the Act Against Unfair Competition[321]. Bearing that in mind, one should ask, whether copyright protection is needed in cases, where frames or IMG-links are created, disguising the real origin of a work[322]. The German Act Against Unfair Competition makes use of the general clauses of §§ 1, 3 UWG[323], that are flexible enough to handle a big number of different situations. Therefore, one should assume, that even in the case of frames and IMG-links there is a general authorisation of the rightholder to link to his pages. In cases where there would be intolerable deceptions, the rightholder should be able to enforce his right by engaging the Act Against Unfair Competition[324] or in cases where trademarks are concerned, the Trademark Act[325]. In cases where reputational damages occur by defamation or other there are even further remedies under the concept of

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[319] *Ibid*, p. 7: *"Wer Webseiten ins Internet stellt, muss mit Verweisen rechnen und ist grundsaetzlich hiermit einverstanden."*

[320] LG Düsseldorf, Urteil vom 29. April 1998, 12 O 347/97 – *'Frames I'*, p. 4, http://www.netlaw.de/urteile/lgd_3.htm

[321] For U.S. law, see: *Bolin*, p.4, http://www.bitlaw.com/internet/linking.html: "Reverse passing off by using a link to pass-off another's work as one's own most likely violates state law governing competitive business practices."

[322] *Bolin* regards that as an infringement of net etiquette, *Ibid.* However, such a statement is of no legal value.

[323] In fact, the general clause is contained in § 1 UWG. However, in practice §§ 1 and 3 UWG are regularly mentioned together and are almost regarded as a unit, as very often the requirements of both sections are met. The general clause in § 1 UWG in its scope of application is so wide that German jurisdiction has developed a system of groups of application and is thereby getting close to case law as known by the common law system.

[324] In the U.S. that was done *inter alia* in the case of Washington Post Co. et al. v. Total News Inc. et al. No. 97 Civ. 1190 (PKL), settled 6/6/97. See also: *Koch*, NJW-CoR 1997, 298, 301. In a case of comparative advertising in the Internet, the LG Frankfurt granted an injunction based on the Act Against Unfair Competition, see: LG Frankfurt, Urteil v. 27.5.1998, Az.: 3/12 O 173/97; rechtskraeftig, http://www.afs-rechtsanwaelte.de/urteile48.htm. See also: *Hoeren*, WRP 97, 993-1126 *passim; Dethloff*, NJW 1998, 1596 ff. *passim*.

[325] Markengesetz vom 2. Januar 1968 (MarkenG). However, claims based on trademark infringement may sometimes be weak; see: *Kuester/Nieves*, p. 2, http://tklhr.com/articles/hyper.html.

protection of the personality right[326]. Consequently, even in cases of framing and IMG-links a general authorisation of the author should be assumed[327].

The same can be said about the legal situation in South Africa, without going into any detail. South Africa has an elaborate compilation of case law concerning the law against unfair competition[328]. For instance, the following concepts shall be mentioned here, which could be of importance: Passing off[329], deception as to own goods, service or business[330], copying and adoption of rival's performance[331] or interference with rival's contractual relationship[332].

However, it has to be pointed out, that such a proposal would also have it disadvantages. The Act Against Unfair Competition may only be applied in the course of business activities for purposes of competition (§ 1 UWG). Thus, a person acting privately could not be stopped by this Act. However, a private person using without permission another persons name or a trademark could be pursued under § 12 BGB or the Trademark Act. Assuming the rightholder's consent to linking also would not lead to a waiver in regard to the right of recognition of authorship, § 13 UrhG, Art. 6bis RBC. The rightholder therefore could ask the creator of the link to observe this right. Otherwise there would be a valid suit under the concept of contributory infringement. One still has to consider, that the one displaying sites in the Internet has to expect generally linking even by utilising frames or IMG-links. Who does not agree to that practice should either consider to refrain from displaying certain works in the Web or should make use of technical devices, which prevent the use of frames or IMG-links. However, commercial users will receive some amount of protection by other laws than the Copyright Act.

The alternative could be, that one would allow framing only in cases, where the URL of the site, which is linked to, is well visible within the frame[333]. That would mean that authorisation is given only, where the frame does not disguise the true origin of the linked page. *Erasmus*[334] proposes, that framing shall only be allowed under the condition, that "the secondary site's home page and advertising on it cannot be distorted; that the URL of the secondary site must appear on the user's browser after the link is completed; and that the primary website must not use its own advertising to border the frame of the secondary website". Coming to this conclusion, even though *Erasmus* beforehand discussed the Shetland Times Case, it is unfortunately not clear on which legal grounds he settles his deduction.

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[326] Zum Schutz des Persönlichkeitsrechts, see: Palandt-*Thomas*, § 823, mn. 175 ff.
[327] Different opinion, obviously *Kochinke/Troendle*, CR 1999, 190, 193, but without any substantial reasoning. Left open: *Smith G.*, p. 28.
[328] *Naudé*, Law of SA, Vol. 2, p. 266 ff.; *Dean*, p. 1-65 ff., at 10.10.
[329] *Naudé*, Law of SA, Vol. 2, p. 270 ff., at 399; *Dean*, p. 1-68, at 10.13.
[330] *Naudé*, Law of SA, Vol. 2, p. 279 ff., at 400.
[331] *Naudé*, Law of SA, Vol. 2, p. 283, at 402.
[332] *Naudé*, Law of SA, Vol. 2, p. 284 f., at 404.
[333] *Erasmus*, http://www.mbendi.co.za/werksmns/index.htm?page=/werksmns/net_law/guide03.htm, p. 7.
[334] *Ibid.*

That would leave open the problem of IMG-links. To prohibit those links in general would definitely be to wide and not in the interest of numerous authors. Consequently, a Court would have to consider each individual case, whether authorisation could be assumed or not. But that would rise a number of questions. Which criteria are to be applied? When can consent be assumed and when not? Such a result would make law quite unpredictable and should therefore not be favoured.

Of course, the above said is only valid in regard to the assumption, that the site to which it is linked to does not contain any infringing material of its own. Where that is the case, the one who knowingly creates a link to such a page shall be liable under contributory infringement.

4.5.5.5 Meta-Tags and Refresh-Tags

Meta-tags are embedded in the HTML-code used to create Web sites. What makes meta-tags so special is, that they are not visible to the viewers of a page. Meta-tags contain data such as keywords for search engines and other information, that may be used to retrieve a document. Meta-tags are a useful tool in order to find a certain site by employing a search engine. However, the designer of a Web site may make use of meta-tags, which have in fact nothing to do with his site. Therefore, it might happen, that the one using a brand name or a trademark as a keyword, may find himself suddenly deviated to the site of a competitor. The embedding of a refresh-tag in a site has the effect, that the viewer after a certain period of time is suddenly linked to another page without his contribution.

The use of meta-tags and refresh-tags has little potential for copyright infringement. These tags are used to decoy viewers: the one making use of the tag attracts the downloading of his page. However, especially in regard to the use of trademarks there is room to employ the Trademark Act or Act Against Unfair Competition[335].

5 Conclusion

It has been shown, that in both legal regimes, still a lot needs to be done in order to meet the challenge of the Internet in regard to legal matters. But, one could also discover, that in many ways existing rules can already be employed in order to achieve satisfactory results. However, it would be desirable if certain legal interpretations could be backed up by further reference to jurisdiction. In that regard the Courts are asked to make themselves familiar also with technical aspects of the Internet as at least a basic technical understanding must be assumed essential to provide an equitable outcome. At the same time governments are asked to support international endeavours to harmonise existing legislation and to find new rules which give justice to future technical developments. The same is true with the legislative body, who is asked to

[335] *Kochinke/Troendle*, CR 1999, 190, 192; *Koch*, NJW-CoR 1998, 45, 47; *Ernst*, NJW-CoR 1997, 493; LG Mannheim, Urt. v. 1.8.1997, 7 O 291/97 = NJW-CoR 1997, p. 494; see also: Oppedahl & Larson v. Advanced Concepts, Robert A. Welch. Code Team-LBK, Inc. U.S.D.C., Distr. of Colorado, civil action No. 97-Z-1592, 23.7.1997 (http://www.Loundy.com/CDLB/Meta_Tags.html); (http://www.patents.com/ac/complain.sht).

alter existing rules and implement new rules to adapt the law to the reality of online transfer. At the same time all lawyers are asked to check in how far existing rules are already sufficiently employed to their maximum extend. In regard to the Internet, great emphasis has so far been laid on copyright law. But it seems, that many problems can be better solved by employing rules about unlawful competition. There seems to be some potential and it is on the lawyer on activating it.